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No. A-1018.

In the
Supreme Court of the United States.

OCTOBER TERM, 1983.

ROBERT ANGELO CUIPPONE AND
ANTHONY MICHAEL PORCELLI,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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No. A-1018.

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ROBERT ANGELO GUIPPONE AND
ANTHONY MICHAEL PORCELLI,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Robert Angelo Guippone and Anthony Michael Porcelli petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on February 22, 1983 and May 2, 1983.

Proceedings Below[1]

Following a jury trial in the United States District Court for the Southern District of New York (Owen, J.), both petitioners were convicted on two counts: conspiracy to possess heroin and cocaine with intent to distribute (Count 1), and possession with intent to distribute and distribution of three-quarters of a kilogram of cocaine (Count 7). In addition, petitioner Porcelli was also convicted of possession with intent to distribute and distribution of one-eighth of a kilogram of heroin (Count 9).

Both petitioners were sentenced to a term of thirty years imprisonment for each count,[2] to be served concurrently.[3] On February 22, 1983, the United States Court of Appeals for the Second Circuit affirmed their convictions on all counts. The court's opinion is reported at 702 F.2d 299 (2d Cir. 1983) and is reproduced in the appendix at 2a-52a. A timely petition for rehearing was denied on May 2, 1983 (53a-54a *infra*). The time for filing a petition for writ of certiorari was extended to and including July 31, 1983 (55a, *infra*).

Jurisdiction.

The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1254(1).

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[1] The parties to the proceeding in the court whose judgment is sought to be reviewed were Willard Williams, Saint Julian Harrison, Clarence Haynes, Onzelo Markum, Eric Nalven, Willie Terry, Paul Jenkins and petitioners Robert Angelo Guippone and Anthony Michael Porcelli. Supreme Court Rule 21.1(b).

[2] Each was sentenced pursuant to 21 U.S.C. § 851.

[3] In addition, each was sentenced to a life-time special parole and to fines of $50,000 for each count.

Introduction.

Petitioners Robert Guippone and Anthony Porcelli respectfully present this Honorable Court with three issues of profound significance in the highly-charged area of invasion of privacy by resort to advanced electronic technology. They seek the wisdom of this Court in the definition and application of standards for testing the authenticity and accuracy of evidence obtained through the bugging of their conversations. In particular, petitioners claim that their right of access to the originals of the tape recordings used against them for purposes of independent expert analysis was requested and wrongfully denied.

The Sixth Amendment right to confront the evidence is at the heart of the American system of justice. "In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact." *Dennis* v. *United States*, 384 U.S. 855, 875 (1966). The authentication of magnetic tapes for legal purposes[4] is not a task for "untrained ears," nor can it be confined to the storehouse of the government where said tapes are the sole device by which alleged crimes are proved and precious liberty is lost.

Because of the increasing resort to electronic surveillance in federal and state law enforcement, and because of the express intent of Congress that such evidence be received in pure form and that its integrity be preserved as such, it is essential that this Court clarify the questions arising in this case where the defendants Guippone and Porcelli clearly raised a colorable claim that the evidence against them was tampered with. The

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[4] See Weiss, M. and Hecker, M., "The Authentication of Magnetic Tapes: Current Problems and Possible Solutions," Report of the National Commission for the Review of Federal and State Laws Relating to Wire Tapping and Electronic Surveillance (1976); especially see pp. 219, 222-224.

trial court wrongfully placed on them the burden of proving such tampering, then calculated the weight of the burden far-beyond any reasonable probability standard, and finally, withheld access to the original tapes so that the burden could not be met. Fundamental fairness and due process require the guidance and supervision of this Court for the benefit of all citizens.

Questions Presented.

I. Do Fifth Amendment principles of Due Process permit a conviction to rest on tape recordings of defendants' communications when access to the original tape recordings is requested by the defendants and denied by the trial court?

A. Did the imposition of a burden on the defendants to present plausible evidence indicating an alteration or distortion of tape recorded evidence as a condition precedent to their being allowed the opportunity for their expert to examine the original tape recordings violate Due Process?

B. Does the conflict between the Second Circuit, on one hand, and the First, Third, Fifth and Seventh Circuits, on the other hand, over the issue of whether a defendant must present plausible evidence of alteration or distortion of tape recordings *prior* to being granted access to the originals of such tapes require authoritative resolution by this Court?

C. Did the Court of Appeals' sanctioning of the burden imposed upon the defendants by the trial court, which included requiring the defendants to provide sworn evidence as to the specific conversations that were omitted from the tape recordings deviate so far from all

other decisions as to mandate this Court's deciding proper standards governing a defendant's access to evidence possessed by the government?

II. Do Fifth Amendment principles of Due Process and this Court's powers of supervision require relief when the Court of Appeals based its decision denying petitioners' constitutionally-based contention relating to their expert not being provided with access to the original tapes of their intercepted communications on appellate fact-findings devoid of evidentiary support?

III. Did the district court's denial of expert access to the original tape recordings violate defendants' right to confront the government's witnesses on the issue of the authenticity of the tapes, by depriving them of any opportunity to rebut and constraining them to stand mute rather than attack the integrity of the tapes when they were offered as proof?

Constitutional and Statutory Provisions Involved.

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, withoud due process of law. . . .

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .

Federal Rule of Criminal Procedure 16(a)(1)(A) provides, in pertinent part:

> Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any relevant written or recorded statements made by the defendant. . . .

Federal Rule of Criminal Procedure 16 (a)(1)(C) provides, in pertinent part:

> Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects . . . which are within the possession, custody or control of the government, and which are material to the preparation of his defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

Statement of the Case.

A. *The District Court Repeatedly Denied Petitioners' Request that Their Expert be Allowed Access to the Original Tape Recordings for Independent Analysis.*

On February 18, 1981, an order was issued by the United States District Court for the Southern District of New York (Ward, J.) authorizing the interception of oral communications from the first floor of a duplex at East 89th Street, New York for up to thirty days. That apartment was the private residence of Willard Williams (Appellate Appendix 318, hereafter "AA."). A second order authorizing identical interception of oral communications was issued by Judge Ward on April 2, for an additional thirty days. Video surveillance, searches of Williams' garbage, searches of residences and safe deposit boxes, and physical surveillances were also employed

during this investigation into federal narcotics violations (AA. 178).

Robert Guippone and Anthony Porcelli were indicted along with seventeen others in a 25 count indictment on July 31, 1981 (AA. 43). Their defense to the charges against them was that their relationship with Willard Williams was based on policy gambling, *i.e.*, numbers, and that they were not involved in Williams' drug trafficking schemes and that the tape-recorded conversations between Williams and themselves would provide categorical evidence in support of this defense. The entirety of the evidence from which the government urged conviction on the substantive counts and the indispensable evidence underlying the conspiracy charge was contained in intercepted conversations between them and Williams in Williams' apartment. Guippone and Porcelli contended that the tapes were flawed by material deletions which distorted the content and import of their conversations with Williams.[5] They made repeated attempts to obtain an order from Judge Owen requiring the government to make the critical *original* tape recordings available to them for independent expert analysis (AA. 401-402). The trial court repeatedly ruled that the only basis upon which the tapes could be subjected to an evaluation would be if a defendant submitted an affidavit asserting that his words had actually been *changed* or if some words had been *added* (AA. 402). Since defendants' claim was that words had been removed, rather than changed or added, the court would not permit expert access to the original tape recordings for testing.

During the pre-trial phase, defendants submitted to the court the affidavit of Arnold Goldberger, an electronic com-

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[5] The prosecution's own expert on gambling, Officer Murray, conceded that contrary to the government's transcript, he heard gambling-related conversations on two tapes (AA. 1247-1248; Trial Tr. 3388-3389). Other evidence of a relationship based on gambling was adduced (AA. 1459-1460, calculations consistent with numbers, not drugs).

munications expert, who stated that he had "listened to and preliminarily examined" certain *copies* or *three* tape recordings of defendants' intercepted communications with Williams and found "[s]ignificant aberrations, which seriously call[ed] into question the authenticity of these recordings . . . and warrant[ed] further examination and analysis" (AA. 392-393). A second affidavit of Mr. Goldberg submitted by defendants to the court stated that in addition to "certain interruptions in the conversations, . . . [t]he high probability of alteration [of two particular tapes] has been confirmed by other objective findings made by me from an analysis of the copies . . . for example variations in signal to noise ratio." He further stated that examination of the originals would permit him to "render an opinion (as to authenticity) within a reasonable degree of scientific certainty." Both affidavits asserted that "*the integrity of the recordings and equipment can be safeguarded since the aforesaid examination may be made by a government designated expert in my presence* (emphasis added) (AA. 392-397). *Neither* request for the originals even hinted at a wish to remove the tapes from the government's custody.

B. *The Burden of Proof to Present Plausible Evidence Indicating an Alteration or Distortion of the Tape Recorded Evidence was Placed on the Defendants as a Condition Precedent to Their Being Allowed the Opportunity to Examine the Original Tape Recordings.*

Judge Owen found these two submissions insufficient, ruling that nothing would suffice but a sworn statement from a party to the recordings that he did not say what the recording in its present state reflected (AA. 403-406). Thereafter, the defendants presented a written motion (AA. 387) seeking (a) an independent analysis of the critical tapes without the requirement of further affidavits, and alternatively, without waiver of their assertion of their right to the examination,

(b) either use immunity if the affidavits as described by the court were still required, or, in the alternative, (c) a ruling that such affidavits would be covered by *Simmons* v. *United States*, 390 U.S. 377 (1969). The motion was accompanied by a third affidavit of Mr. Goldberger, stating that "similar aberrations found by me in [the tapes referred to in the second affidavit] were also found in [six additional tapes]. The variations in noise characteristics in all of the aforesaid tapes underlie the need for an examination by me of the original tape recordings" (AA. 396-397).

In a memorandum opinion, Judge Owen then withheld ruling on defendants' motion, but found "the affidavit or affidavits from participants in conversations setting forth with specificity the alterations claimed to have been made . . . shall be subject to the protection of [*Simmons*]" (AA. 388). Thereafter, both defendants filed sworn affidavits wherein they set forth that:

> each had communications in the Williams apartment with Willard Williams regarding, among other subjects, the general subject of gambling, and the particular subjects of the amounts of money owed by Williams to us as a result of his participation as our agent in numbers, i.e., policy gambling in New York during the Winter and Spring of 1981.
>
> (3) That each have listened to all the tape recordings provided to our counsel and in particular to all those conversations listed in our motion regarding which the Government alleges we participated and they do *not* include conversations, or parts thereof which we particularly recall having with Williams during the above-stated time period at the above-stated location regarding the above-stated subjects.
>
> (4) More particularly, the conversations contained in Reel # 199 omits Porcelli telling Williams that he was coming

to his residence to collect money possessed by Williams as a result of the numbers operation and the conversation contained in Reel # 166 omits the beginning of the conversation, i.e., it obviously starts in the middle (the exact words preceding the recorded part of the conversation cannot be recalled definitively but were other than the first words on the tape; and also omits specific conversation regarding numbers and the collection of money from numbers activity which followed the recorded words 'hitting these . . . numbers like . . .'."

(AA. 398-399.)

The trial court denied defendant's motion, stating that "the fact that gambling conversations may have been omitted is not a showing that there may have been tampering with the tapes as to conversations alleged [illegible word] with narcotics" (AA. 398).

At trial, defendants objected to the introduction of the tapes because of the pretrial denial of independent analysis and access to the original tapes, and denial of access to an expert evaluation (AA. 872-873, 883). After hearing the tapes, however, the trial court once again denied an application for an independent evaluation, declaring "I haven't heard anything so far that to my untrained ear . . . would suggest these tapes were in the slightest altered" (AA. 960). Repeated reassertions of the defendants' need for independent analysis (AA. 959-960, 963-964, 1251, 1393) were all denied (AA. 964, 1251, 1191). Although the prosecutor at one point asserted that "Rule 16(a)(1)(c) evidence was available," he did not contest Guippone's counsel's statement that he had not been provided with access to the original tapes (Pre-trial Hearing Tr. 1068). The prosecutor represented to the court only that cassettes of *copies* of the originals were available (Pre-trial Hearing Tr. 853).

Trial counsel repeatedly referred in their motions for independent analysis and in their authenticity objections to their

belief that omissions of exculpatory gambling terms distorted the substance and import of defendant's conversations with Williams: "[in] some of the tape recordings where there appeared to be some unexplainable gaps. . . . We have a question as to authenticity." (Trial Tr. 843-844.) "We are arguing omissions. . . ." (AA. 1251.) "Omissions come within the ambit of alteration." (AA. 1251.) "Alterations of tapes take many forms." (AA. 963.)

Both of petitioners' counsel objected to the offer of the tapes at trial, arguing that the comparison by the government of the originals and the enhanced copies was not susceptible to confrontation because of the denial of access by defendants or their counsel to the originals (AA. 882-883). Other objections to the tapes were made on grounds of probable alteration, lack of independent analysis, and denial of discovery (AA. 886-888; Trial Tr. 862). The trial court was fully aware of and rejected with finality the "repeated requests [of defendants] to look at the Court originals" (AA. 959-964).

C. *The Court of Appeals' Findings of Fact on the Critical Issue of Access to the Original Tape Recordings and the Absence of Plausible Evidence Indicating Tampering with the Tapes are Clearly Erroneous and Without Support in the Record.*

The Second Circuit, in its opinion (702 F.2d 312-313, 32a-33a, *infra*) found that the prosecution had:

> made the original tapes available to appellants and their experts for analysis in his office. However, appellants declined this offer, seeking instead to analyze the original tapes outside the government's custody but with a government agent present. In the absence of any plausible evidence indicating an alteration or distortion of what

> was recorded on the tapes and in light of the trial court's finding of authenticity and accuracy, the request to remove this fragile evidence from the government's custody was unwarranted.

In their petition for rehearing, Guippone and Porcelli focused on the Appeals Court's clearly erroneous finding that their expert ever, *anywhere*, had access to the original tapes, and quoted extensively from the record to demonstrate this error, urging the court to correct this error of fact and to adopt the holding of *United States* v. *Fuentes*, 563 F.2d 527, 532 (2d Cir. 1977), *cert. denied*, 434 U.S. 950 (1977) that access to the original tape recordings of a defendant's conversations is a matter of right.[6]

Petitioners never declined to have their expert examine the recordings in the prosecutor's office, for the opportunity was not only non-existent, it was vigorously resisted by the government:

> MR. WEINBERG: We have a right to it under the *Fuentes* case. I don't believe it is a discretionary area. We are asking your Honor to order the Government to give us certain original tapes. . . . The expert can be with an F.B.I. expert. He can do it in their lab. *We are not asking to take custody.* We want a chance for our expert to examine them.

(Appendix to petition for rehearing, hereafter APR. Exhibit I at 4.)

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[6] Relevant portions of the record supporting their claim of denial of access to the original tapes were appended to the petition for rehearing. However, the petition was denied.

MR. VICTOR: I want to make clear whether the tapes are available to use for our expert. If your Honor is saying no, the record is clear.
THE COURT: I am not aware of any showing requiring it.
MR. VICTOR: I respectfully except.

(APR. Exhibit P, at 1303-1304; AA. 959-960.)

Reasons for Granting the Writ.

I. WHERE A CONVICTION RESTS ON TAPE RECORDINGS OF A DEFENDANT'S COMMUNICATIONS AND ACCESS TO THE ORIGINAL TAPE RECORDINGS IS REQUESTED BY DEFENDANTS AND DENIED BY THE TRIAL COURT, FIFTH AMENDMENT PRINCIPLES OF DUE PROCESS ARE VIOLATED.

> [f]undamental fairness is violated where a criminal defendant on trial for his liberty is denied the opportunity to have an expert of his choosing . . . examine a piece of critical evidence whose nature is subject to varying expert opinion.

Barnard v. *Henderson*, 514 F.2d 744, 746 (5th Cir. 1975.) In *Barnard*, a defendant who had not been permitted to have a ballistics expert examine the alleged murder weapon, a critical piece of evidence, was granted a new trial. Also see *United States* v. *Durant*, 545 F.2d 823 (2d Cir. 1976) where the Court ordered a new trial for a defendant who had requested but had been denied the court appointment of a fingerprint analyst in order to refute the expected testimony of the govern-

ment expert. In *United States* v. *Gaultney*, 606 F.2d 540 (5th Cir. 1979), rev'd on other grounds, 451 U.S. 204 (1981), error was found in not permitting a chemist chosen by the defense to inspect seized narcotics. A new trial was ordered for the defendant . . *White* v. *Maggio*, 556 F.2d 1352 (5th Cir. 1977) where the defendant could not refute the state witness' testimony that bullets had been fired from a particular gun because his pretrial request to have the evidence evaluated by his own expert was denied. Due process required a new trial in *Bowen* v. *Eyman*, 324 F.Supp. 339 (D. Ariz. 1970) where a defendant in a rape prosecution was not permitted access to the evidence necessary to perform a comparative blood test.

The defendants' convictions were based on recordings of their own words. The government alone had access to the original tapes allegedly reflecting said evidence. The failure of the trial court to provide equal access to the original tapes was egregious where defendants clearly challenged the completeness and authenticity of the copies by their own affidavit and affidavits of an electronics expert.

A. *The Imposition of a Burden on the Defendants to Present Plausible Evidence Indicating an Alteration or Distortion of Tape Recorded Evidence as a Condition Precedent to Their Being Allowed the Opportunity to Examine the Original Tape Recordings Violated Due Process.*

The imposition of a burden of production as a condition precedent to independent access to and examination of original tape recordings which could be satisfied *only* by affidavits of defendants (and only by affidavits alleging changes or additions) is without precedent. Such access is normally provided without issue. *United States* v. *Fuentes*, 563 F.2d 527, 532 (2d Cir. 1977), *cert. denied*, 434 U.S. 950 (1977); *United States* v. *Cortellesso*, 663 F.2d 361, 364 (1st Cir. 1981); *United States* v.

Chiarizio, 525 F.2d 289, 293-294 (2d Cir. 1975); *United States* v. *DiMuro*, 540 F.2d 503, 512, n.4 (1st cir. 1976). Independent access and examination is a matter of right pursuant to Federal Rule of Criminal Procedure 16(a)(1)(A) and 16(a)(1)(C) and in fairness.

In essence the trial court demanded that defendants prove that the omissions were caused by alterations in the tapes, while simultaneously denying access to the only possible source of such proof. Expert examination of the original tapes was necessary to confirm or deny the "high probability of alteration" (AA. 396-397); yet the expert was denied access until he first proved with certainty the very fact which he could not determine without access to the originals (AA. 884-888, 963-965, 387-389, 396-399, 404-406). See Statement of the Case at Section B, *supra* where portions of the record are extensively cited in support of the nature and extent of the burden imposed.

B. *The Conflict Between the Second Circuit and the First, Third, Fifth and Seventh Circuits over the Issue of Whether a Defendant must Present Plausible Evidence of Alteration or Distortion of Tape Recordings Prior to Being Granted Access to the Originals of Such Tapes Requires Authoritative Resolution by This Court.*

In *United States* v. *Fuentes*, 563 F.2d 527 (2d Cir. 1977), *cert. denied*, 434 U.S. 950 (1977), the appellant argued that the surveillance tapes were inadmissible against him because the informant who recorded him may have tampered with the recording devices. The court dismissed this claim as being "completely speculative" and concluded that "had Fuentes (desired to challenge the admissibility of the tapes on the grounds they were tampered with) he could have called an expert to examine the tapes for evidence of tampering." *Id.* at 532. The Second Circuit further concluded that:

> since recorded evidence is likely to have a strong impression upon a jury and is susceptible to alteration, we have adopted a general standard, namely, that the government "produce clear and convincing evidence of authenticity and accuracy" as a foundation for the admission of such recordings.

United States v. *Knohl*, 379 F.2d 427, 440 (2d Cir.), *cert. denied*, 389 U.S. 973, 88 S.Ct. 472, 19 L.Ed. 2d 465 (1967). *Id.* However, in the instant case, the Second Circuit clearly upholds a weighty requirement that the defendants produce plausible evidence of alteration or distortion of what was recorded on the tapes *before* allowing them access to the original tapes.

The First Circuit in *United States* v. *Cortellesso*, 663 F.2d 361 (1st Cir. 1981), where appellants contested the court's findings that the government had established an adequate foundation for the admission of tape recordings of court-authorized electronically intercepted telephone conversations, concluded that: "If appellants really suspected tampering . . . they could have engaged an expert to examine the tapes and rebut the government's proof." (Citation to *Fuentes* omitted.) In marked contrast, see *United States* v. *Starks*, 515 F.2d 112 (3d Cir. 1975), cited and distinguished in *United States* v. *Craig*, 573 F.2d 455 (7th Cir. 1977) at 479.

The Fifth Circuit in *United States* v. *Biggins*, 551 F.2d 64 (5th Cir. 1977) held that the party introducing a tape into evidence has the burden of going forward with sufficient evidence to show the recording is an accurate reproduction of the conversation recorded. This required, in pertinent part, a showing that there was an "absence of material deletions, additions, or alterations in the relevant part of the tape." 551 F.2d at 66. Following *Biggins*, the Fifth Court has concluded:

> The second issue, the accuracy of the recording, is the most crucial in deciding whether the recording is authentic. . . . However, the possibility of alterations to the tape need not be eliminated absolutely, but only as a reasonable possibility.

United States v. *Bright*, 630 F.2d 804, 819 (5th Cir. 1980).

A number of cases have arisen raising claims that the government failed to follow the sealing requirements of 18 U.S.C. § 2518(8)(a).[7] These cases support the petitioners' contentions that the authenticity of these surveillance tapes is the critical question and that the burden to challenge authenticity based on tampering occurring *during* or immediately after interception, i.e., pre-sealing, must not and should not be insurmountable.[8] The legislative history of Title III of the Om-

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[7] *United States* v. *Johnson*, 696 F.2d 115, 124 (D.C. Cir. 1982); *United States* v. *Gigante*, 538 F.2d 502, 505 (2d Cir. 1976); *United States* v. *Diadone*, 558 F.2d 775, 780 (5th Cir. 1977); *United States* v. *Lawson*, 545 F.2d 557, 564 (7th cir. 1975); *United States* v. *Falcone*, 505 F.2d 478 (3d Cir. 1974) at 483-484, *cert. denied*, 420 U.S. 955 (1975); *United States* v. *Diana*, 605 F.2d 1307, 1314 n.6 (4th Cir. 1979), *cert. denied*, 444 U.S. 1102 (1980). Petitioner's case is similar to many of these cases in that no chain of custody of the tapes was proved, but different in that a clear challenge to the authenticity of the tapes was raised.

[8] Petitioners' claim of alterations in the tapes introduced against them is strikingly different from that of the defendants in *United States* v. *Fuentes*, *supra*; *United States* v. *Bright*, 630 F.2d 804 (5th Cir. 1980) and *United States* v. *Clinger*, 681 F.2d 221 (4th Cir. 1982), *cert. denied*, 103 S.Ct. 221 because those cases involved informants wearing "body bugs" (although *Fuentes* also involved an informant with a bug in his vehicle which was apparently controlled by a device in the armrest of the car). The courts in each of those cases were partially persuaded by the fact that manipulating a tape recording device worn on the body or in the car's armrest would require conspicuous movements and thus found no reasonable possibility that the informants would risk such moves in an effort to alter the tapes. See, e.g., *United States* v. *Clinger*, *supra* at 224. The bug at issue in this case was a powerful room bug, safely monitored from an unobservable distance.

nibus Crime Control and Safe Streets Act shows clearly that the sealing requirement was intended to insure the integrity of the tapes *after* interception. 1968 U.S. Code Cong. & Adm. News, pp. 2193-2194. In such a sensitive area as electronic invasion of privacy, there is an obvious compelling need for standards to protect the integrity of tapes *during* and immediately after the interception process. The intent of Congress to ensure the integrity of surveillance tapes will be absolutely thwarted if tampering is permitted while tapes are being made or before the seal is applied.

II. Fifth Amendment Principles of Due Process and this Court's Powers of Supervision Require Relief when the Court of Appeals Based its Decision Denying Petitioners' Constitutionally-Based Contention Relating to Their Expert's being Denied Access to the Original Tapes of Their Intercepted Communications on Appellate Fact-Finding Devoid of Evidentiary Support.

The facts as found by the Appeals Court below, namely that petitioners experts had access to the original tapes for analysis, that they sought to analyze the original tapes outside the government's custody and that there was an absence of plausible evidence indicating an alteration or distortion of what was recorded on the tapes are devoid of evidentiary support and have no basis in the record. Where factual findings are "so totally devoid of evidentiary support as to render (a defendant's) conviction unconstitutional under the Due Process clause of the Fourteenth Amendment," this Court has granted certiorari to review. *Thompson* v. *City of Louisville*, 362 U.S. 199 (1960); *Garner* v. *Louisiana*, 368 U.S. 157, 163 (1961); *Jacobellis* v. *Ohio*, 378 U.S. 184, 189 (1964) and cases cited therein; *Spano* v. *New York*, 360 U.S. 315, 321 (1959); especially see *Henry* v.

Mississippi, 379 U.S. 443 (1965). The facts found by the Second Circuit are so erroneous on this critical issue as to represent a gross miscarriage of justice and proper supervision of the federal judiciary demands that the lower court be set aright. See Statement of the Case at Section C, *supra*, citing voluminous references to the record in support of the facts as petitioners plead herein, and not as found by the Second Circuit Court of Appeals. This Honorable Court's guidance is needed to set standards for review and remand when the Court of Appeals findings are devoid of evidentiary support.

III. The District Court's Denial of Expert Access to the Original Tape Recordings Violated Defendants' Right to Confront the Government's Witnesses on the Issue of the Authenticity of the Tapes, by Depriving Them of the Opportunity to Rebut and Constraining Them to Stand Mute Rather than Attack the Integrity of the Tapes when They were Offered a Proof.

See *United States* v. *Williams*, 613 F.2d 560 (5th Cir. 1980); *United States* v. *Gaultney*, 606 F.2d 540 (5th Cir. 1979), rev'd on other grounds, 451 U.S. 204 (1981). Petitioners Guippone and Porcelli had no meaningful opportunity to confront the only evidence condemning them; evidence which they knew and claimed to be distorted and somehow tampered with. Although they made every reasonable effort to object and to meet the court's requirements, they were essentially trapped in a vicious "Catch-22"-type situation. They could not meet the burden imposed without access to the original tapes. They could not have that access without *first* meeting the burden. When the tapes were offered, they were constrained to merely raise their objections without the opportunity to truly confront.

Under the circumstances of this case, and the rulings of the trial court, their Sixth Amendment rights were rendered ephemeral. The Second Circuit Court of Appeal's treatment of this critical issue failed to respect the record and rendered their confrontation rights meaningless.

Conclusion.

The record in this case unambiguously shows that defendants' expert *never* had access, anywhere, to the original tapes and that an excessive and impossible burden was placed on the defendants to produce evidence of tampering with the tapes regarding which independent analysis was sought, *prior* to the access necessary to meet such a burden.

Defendants made repeated requests for an order providing their expert with access to the original tape recordings and never sought to remove the tapes from the government's custody. They consistently accepted the condition that independent analysis of the original tape recordings would be in the context of the government's continued custody of such recordings and in the presence of government representatives.

Although handcuffed by being deprived of access to the original recordings, the defendants presented a more than colorable challenge to the authenticity of the tapes. The right to independent analysis of the tapes is clear under *United States* v. *Fuentes*, *supra*. However, the conflict in the circuits and the lack of development of standards in this critical area of the law shows a need for this Honorable Court to spell out the proper allocation of the burden under such circumstances and the reasonable parameters of "plausible evidence" that tampering has occurred.

Robert Guippone and Anthony Porcelli plead this Honorable Court that electronic devices "lend themselves to diabolical fakery" (*Lopez* v. *United States*, 373 U.S. 427, 468 (1963) (Brennan, J., dissenting) and that "untrained ears," whether those of the judge, the prosecutor, the defense counsel, or the defendant himself, are utterly inadequate where a defendant is confronted with tape recorded evidence which he knows and claims to be false and misleading. The principles of equal access to evidence, a cornerstone of the criminal justice system, see *Dennis* v. *United States*, 384 U.S. 855 (1966) are at stake.

For all the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK 10007

A. DANIEL FUSARO
CLERK

Date: February 22, 1983

Re: U.S.A. v. WILLIE TERRY
Docket No. 82-1125

Dear Sir:

The Court has today handed down a decision in the above entitled cause. Judgement of appellant Haynes reversed; affirmed as to all other appellants the decision of the district court.

A copy of the opinion will be mailed to you tomorrow.

Additional copies of opinions may be obtained from this office in accordance with § 0.17(7) of the rules of this Court supplementing the Federal Rules of Appellate Procedure.

Judgment has been entered today and a mandate will issue in accordance with Rule 41 of the Federal Rules of Appellate Procedure.

Your attention is directed to the provision of Rule 39(c) F.R.A.P. requiring the itemized and verified bill of costs, if any, to be filed within 14 days after entry of judgment, with proof of service.

Very truly yours,

A. Daniel Fusaro
Clerk

By: Assistant Clerk

UNITED STATES of America,
Plaintiff-Appellee,

v.

Willie TERRY, Defendant-Appellant.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Eric NALVEN, Robert Guippone, Willard Williams, Onzelo Markum, Clarence Haynes, Saint Julian Harrison, Paul Jenkins, and Anthony Michael Porcelli,
Defendants-Appellants.

Nos. 346-47, 348, 349-50, 385, 388, 426, 892, Dockets 82-1125, 82-1175, 82-1177, 82-1179, 82-1181, 82-1183, 82-1185, 82-1187.

United States Court of Appeals,
Second Circuit.

Argued Dec. 1, 1982.
Decided Feb. 18, 1983.

Defendants were convicted before the United States District Court for the Southern District of New York, Constance Baker Motley, Chief Judge, and Richard Owen, J., of violations of federal narcotics laws and conspiracy, and appeals were taken. After consolidation of appeals, the Court of Appeals, Mansfield, Circuit Judge, held that: (1) drug enforcement agents' warrantless searches of defendant's trash bags over six-month period did not violate his reasonable expectation of privacy; (2) affidavit was sufficient to support order authorizing electronic surveillance; (3) assistant attorney general's power, as person designated to approve applications for eavesdropping orders, did not expire when Attorney General left office;

(4) giving "community impact" instruction was harmless error; (5) defendants' contemporaneous statements that they refused to supply palm prints because they first wanted advice of counsel were admissible, but error in excluding such evidence was harmless; (6) agents had reasonable basis for believing that a defendant was in an apartment and were entitled to make limited security check of premises; but (7) there was insufficient independent proof of a defendant's participation in alleged conspiracy so as to permit jury to consider coconspirator's statements concerning defendant, and nonhearsay evidence against defendant was insufficient to sustain his convictions.

Reversed in part, and affirmed in part.

1. Searches and Seizures 7(20)

Drug enforcement agents' warrantless searches of a defendant's trash bags over six-month period did not violate his reasonable expectation of privacy; his placement of bags for collection on public sidewalk was not an act of abandonment, and mere fact that he used taped opaque containers did not indicate intent to retain a privacy interest. U.S.C.A. Const. Amend. 4.

2. Searches and Seizures 3.8(2)

Items found in closed containers during a lawful search did not require a separate warrant. U.S.C.A. Const.Amend. 4.

3. Telecommunications 516

Affidavit, in which it was explained that a defendant left his apartment and would not meet with someone he did not know, that a search of his apartment would not reveal his narcotics stash kept nearby, that coconspirators had become suspicious and refused to deal further with undercover agents and that agents were unable through physical surveillance to estab-

lish the significance of the meetings between suspects, was sufficient to support order authorizing electronic surveillance of apartment, though affidavit did not state that all other less instrusive investigative techniques were unlikely to succeed. 18 U.S.C.A. § 2518(1)(c), (2), (3)(c); U.S.C.A. Const. Amend. 4.

4. Telecommunications 516

Affidavit describing standard techniques that have been tried and facts demonstrating why they are no longer effective is sufficient to support an eavesdropping order even if every other possible means of investigation have not been exhausted. 18 U.S.C.A. § 2518(1)(c), (2), (3)(c); U.S.C.A. Const. Amend. 4.

5. Telecommunications 516

Where a defendant conducted his narcotics business only on face-to-face basis from his apartment, it was unnecessary for government investigators first to seek a wiretap before applying for eavesdropping order. U.S.C.A. Const. Amend. 4; 18 U.S.C.A. § 2518(1)(c), (2), (3)(c).

6. Telecommunications 519

Where factual justification for eavesdropping order had not changed at time when an extension was sought, it was unnecessary to vary the specific facts in a renewal application. U.S.C.A. Const. Amend. 4; 18 U.S.C.A. § 2518(1)(c), (2), (3)(c).

7. Telecommunications 512

Assistant attorney general's authorization approving of application for eavesdropping order was not inadequate for failing to state that the three other assistant attorney generals with higher priority were absent or otherwise unavailable; the

assistant attorney general granting the authorization was presumed to have properly exercised his statutory power and the condition precedent was presumed to have been met in absence of any evidence, apart from mere conjecture or speculation, to rebut the presumption. U.S.C.A. Const. Amend. 4; 18 U.S.C.A. § 2516(1).

8. Telecommunications 512

Designation by an outgoing attorney general of assistants to authorize electronic surveillance remains valid at least for reasonable time after attorney general leaves office, even though without an express redesignation by his successor. U.S.C.A. Const. Amend. 4; 18 U.S.C.A. § 2516(1).

9. Telecommunications 512

Assistant attorney general's power, as a person designated by Attorney General to approve application for eavesdropping orders, did not expire when Attorney General left office due to change in administration, in view of the principle of administrative continuity and the fact that the subsequent Attorney General impliedly ratified the designation of his predecessor. 18 U.S.C.A. § 2516(1); U.S.C.A. Const. Amend. 4.

10. Criminal Law 1158(2)

In prosecution for federal narcotics violations, findings that no eavesdropping devices were installed in upstairs of a defendant's apartment and that, in compliance with eavesdropping order, a device with 10 to 15-foot range was installed downstairs in a standard phone with 7 to 8-foot cord were not clearly erroneous. U.S.C.A. Const. Amend. 4.

11. Telecommunications 519

Order, which authorized interception of narcotics-related conversations "from" the downstairs of apartment, permitted

investigators to intercept such communications as might be audible by an unenhanced eavesdropping device in living room, even though they may have originated from upstairs bedroom and could be heard downstairs because of open stairway between the rooms. U.S.C.A. Const. Amend. 4.

12. Telecommunications 520

In prosecution for federal narcotics violations, evidence, including fact that none of the nearly 200 taped conversations introduced into evidence appeared to have originated from upstairs of a defendant's apartment, sufficiently indicated that investigating agents took reasonable steps to limit eavesdropping device's interception of conversations to the interception of narcotics-related conversations originating in downstairs living room. U.S.C.A. Const. Amend. 4; 18 U.S.C.A. § 2518(5).

13. Telecommunications 520

Investigating agents must observe reasonable safeguards against excessive intrusion by eavesdropping device. U.S.C.A. Const. Amend. 4.

14. Criminal Law 627.6(3)

In absence of any plausible evidence indicating alteration or distortion of what was on original recordings of conversations intercepted by eavesdropping device in a defendant's apartment and in view of court's finding of authenticity and accuracy, giving defendants access to original recordings, instead of copies, would have been unwarranted. Fed.Rules Cr.Proc. Rule 16(a)(1)(C), 18 U.S.C.A.; U.S.C.A. Const. Amend. 4.

15. Criminal Law 1172.1(2)
Drugs and Narcotics 132

In prosecution for federal narcotics violations, giving of "community impact" instruction was error, but the error was

harmless, in view of fact that the evidence was overwhelming against all defendants, except a defendant whose convictions were reversed on other grounds, and that the instruction received no prominence.

16. **Criminal Law** 641.2, 1224(3)

Government has right to obtain palm prints pursuant to a lawful custodial arrest, without the presence of counsel. U.S.C.A. Const. Amend. 6.

17. **Criminal Law** 419(1), 1170(1)

In criminal proceeding in which defendants' refusal to supply palm prints was admitted as evidence of consciousness of guilt, defendants' contemporaneous statements that they refused because they first wanted advice of counsel were admissible under exception to hearsay rule for proof of "state of mind," but error in excluding such evidence was harmless, in view of the overwhelming evidence of guilt and in view of defense counsel's efforts to inform jury that defendants refused to furnish prints until they had advice of counsel. Fed.Rules Evid. Rules 106, 802, 803(3), 28 U.S.C.A.; Fed.Rules Cr. Proc. Rule 52(a), 18 U.S.C.A.; U.S.C.A. Const. Amend. 6.

18. **Drugs and Narcotics** 123

Evidence, including evidence that two defendants agreed, in response to a person's request for "rock," to send him "three-quarters" of a kilogram of "Peruvian flake," that a defendant had agreed to "bring down the eighth" and that person expressing need for heroin had paid $30,000 for "boy" the night before, was sufficient to sustain such defendants' convictions of possession of three quarters of kilogram of cocaine with intent to distribute and possession of one eighth of kilogram of heroin. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1)(A), 21 U.S.C.A. § 841(a)(1)(A).

19. Conspiracy 47(12)

In prosecution for federal narcotics violations including conspiracy to possess and distribute heroin and cocaine, evidence was sufficient to warrant jury to find the existence of a single, large-scale "chain-type" narcotics operation; temporary hiatus occurring while three defendants waited for danger to pass did not transform the single ongoing conspiracy into two conspiracies where there was nothing to indicate that any of them viewed their mutual dealings as having terminated. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

20. Criminal Law 370, 371(1)

In prosecution for federal narcotics violations, trial judge did not err in ruling that he would, if a defendant took the stand, admit his 20-year-old narcotics conviction on issue of intent and guilty knowledge where defense counsel claimed that defendant's telephone conversations with certain person related to gambling, rather than narcotics, and defendant refused to remove such issue from dispute by stipulating that the terms used in the taped conversations referred to narcotics. Fed.Rules Evid. Rule 404(b), 28 U.S.C.A.

21. Criminal Law 700

Defendant was not denied fair trial due to prosecutor's alleged use of his eyes to point toward defendant when witness hesitated in identifying defendant, in view of fact that it was found that any hesitation was attributable to fact that defendant's face was blocked from witness by defense counsel's open briefcase, that it was found that any change in prosecutor's facial expression was caused by astonishment when, just as witness was looking for defendant, a codefendant inexplicably rose to his feet and that there was abundant other independent evidence identifying defendant.

22. Criminal Law 393(1)

In criminal proceeding, ordering a defendant to give a voice exemplar was not abuse of discretion.

23. Criminal Law 489

In criminal proceeding, cross-examining a defendant's "voice expert" witness regarding prior occasions when his testimony in other cases had been criticized by the court as unworthy of belief was not error, in that proof that a judge had found that the witness had "guessed under oath" was probative of the weight to be accorded to his testimony. Fed.Rules Evid. Rules 608(b), 613(a), 28 U.S.C.A.

24. Criminal Law 339.5

In prosecution for federal narcotics violations, a thrice-convicted narcotics dealer's identification testimony was admissible for purpose of establishing a defendant's residence and of identifying his voice on a tape after he had refused to stipulate that he was the speaker.

25. Criminal Law 728(2)

In proceeding in which defendant was convicted of federal narcotics violations, in which a thrice-convicted narcotics dealer gave identification testimony and in which the dealer's testimony regarding his sordid history was elicited by defense counsel over Government's objection, defendant waived any possible claims based on prosecutor's reference to such testimony in summation by failing to object.

26. Conspiracy 45
Criminal Law 673(4)

In prosecution for federal narcotics violations, admission of government witness' testimony regarding his own narcotics history and attempts to bribe state court judges was not error,

in that the witness' testimony linked a defendant to the conspiracy; limiting instruction was unnecessary since the complained of testimony related exclusively to witness and could not have been attributed by jury to any other defendant. Fed.Rules Evid. Rules 105, 403, 28 U.S.C.A.; Fed.Rules Cr.Proc. Rule 14, 18 U.S.C.A.; U.S.C.A. Const. Amend. 6.

27. Criminal Law 1168(2), 1169.1(2)

In prosecution for federal narcotics violations, any error in admission of government witness' testimony regarding his own narcotics history and attempts to bribe state court judges or in failing to give a limiting instruction would not have been prejudicial to certain defendant, in view of the abundant independent evidence of his guilt. Fed.Rules Evid. Rules 105, 403, 28 U.S.C.A.; Fed.Rules Cr.Proc. Rule 14, 18 U.S.C.A.; U.S.C.A. Const. Amend. 6.

28. Criminal Law 986.2(6)

Considering defendant's perjured testimony, in imposing sentence for federal narcotics violations, was not error.

29. Criminal Law 641.8

Though it would be inconsistent with *Miranda* to infer a waiver of right to counsel after accused has clearly asserted his right to counsel, unless and until accused asks for a lawyer he may waive his procedural *Miranda* rights. U.S.C.A. Const. Amend. 6.

30. Criminal Law 641.4(1)

Prior to accrual of right to counsel, standard for waiver of such right is whether under the facts and circumstances of the case, including the accused's background and conduct, he understands the right and voluntarily intends to relinquish it. U.S.C.A. Const. Amend. 6.

31. Criminal Law 412.2(1)

Defendant's right to counsel was not violated during interrogation in which he made false exculpatory statement where his rights were scrupulously respected at every stage, with interrogation terminated immediately on his stating that he wanted to consult a lawyer, and there was no suggestion that he was subjected to lengthy questioning or other improper tactics. U.S.C.A. Const. Amend. 6.

32. Criminal Law 1169.12

In prosecution for federal narcotics violations, even if admission of defendant's false exculpatory statement that he had never taken drugs would have been error, it would have been harmless, in view of fact that the statement formed but a miniscule part of the evidence against him.

33. Criminal Law 404(3)

Trial court's determination that probative value of admission of a weapon outweighs danger of unfair prejudice will be upheld unless arbitrary or irrational.

34. Criminal Law 404(4)

In prosecution for federal narcotics violations, admission of a defendant's licensed gun and 300 rounds of hollowed out "dum dum" bullets which had been seized from his basement office was not error, in light of fact that such evidence supported conclusion that defendant intended the gun and ammunition for protection, not of his bar, but of other business, and supported inference that the gun and ammunition were instruments of narcotics trade.

35. Arrest 68, 71.1(4)

Drug enforcement agents, who had valid warrant for defendant's arrest, who knew that telephone at certain apart-

ment was listed to woman with same surname as defendant, who knew that man with such surname had spoken to another person from that apartment, who were informed by boy with such surname on his shirt that his parents lived in the apartment and were not told by boy that father was not at home and who arrived at apartment at 8:45 A.M. on Sunday, had reasonable basis for believing defendant was in apartment and thus had right to enter it; once inside, agents were entitled to make limited security check of the premises.

36. Arrest 71.1(5)

Drug enforcement agent's seizure of scale used to weigh narcotics, while agents were armed with warrant for defendant's arrest and were lawfully in his apartment, was lawful where, though agent had to walk over to box and look into it before determining that it contained a scale, the outside of the box, which was in plain view, bore the name of a balance scale frequently used in narcotics dealing and the open box revealed part of the scale with white powder residue on it. U.S.C.A. Const. Amend. 4.

37. Arrest 71.1(5)

Where drug enforcement agents, who were armed with warrant for defendant's arrest and were lawfully in his apartment, discovered marijuana and a scale used to weigh narcotics during agents' initial pass-through of the apartment, the agents were entitled to remain on the premises to secure the apartment from destruction of evidence and to request assistance of defendant's wife in locating him, and, thus, plain view seizure of business card, which occurred during that period, was lawful. U.S.C.A. Const. Amend. 4.

38. Criminal Law 427(2)

Before jury may consider against a defendant a conspiracy count resting in part on hearsay statements of an alleged co-

conspirator, trial judge must be satisfied by fair preponderance of the independent non-hearsay evidence that the defendant was in fact a member of the conspiracy.

39. Criminal Law 427(5)

Standard for independent proof of participation in conspiracy, before jury may consider hearsay statements of an alleged coconspirator, is not as high as that needed to submit a charge of conspiracy to jury; the proof may be "totally circumstantial" and the court must view the evidence as a whole rather than consider individual items in isolation.

40. Conspiracy 47(1)

Though once a conspiracy has been proved to exist the evidence needed to link another defendant with it need not be overwhelming, government must nonetheless show a likelihood of an illicit association between the declarant and the defendant.

41. Conspiracy 40.1

Mere familiarity with a drug dealer does not make one a member of his conspiracy.

42. Criminal Law 422(1)

Association with a conspirator does not provide a sufficient basis for the admissibility of hearsay statements of an alleged coconspirator.

43. Criminal Law 427(5)

Scraps of paper retrieved from a defendant's trash and his notebook containing references to "Legs" were hearsay, and, thus, could not be used to meet requirement that trial judge be satisfied by a fair preponderance of the independent nonhearsay evidence that a defendant was in fact a member of the con-

spiracy before jury could consider hearsay statements of an alleged coconspirator.

44. Criminal Law 419(1)

Statements made by defendant when he dialed number at second defendant's apartment house were "hearsay" as to such defendant where only the first defendant's voice was recorded and there was no non-hearsay proof that second defendant was person on the other end of the line.

See publication Words and Phrases for other judicial constructions and definitions.

45. Criminal Law 427(5)

In prosecution for federal narcotics violations, there was insufficient independent proof of defendant's participation in alleged conspiracy so as to permit jury to consider coconspirator's statements concerning defendant, and the nonhearsay evidence against defendant was insufficient to sustain his conviction of conspiracy and of the substantive offenses. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1)(A), 406, 21 U.S.C.A. §§ 841(a)(1)(A), 846.

46. Telecommunications 363

Evidence was insufficient to sustain defendant's conviction of using telephone to further conspiracy, in view of the insufficiency of the evidence to convict defendant of the predicate felony of membership in the conspiracy. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 403(b), 406, 21 U.S.C.A. §§ 843(b), 846.

Bennett M. Epstein, New York City, for defendant-appellant Terry.

Stanley Neustadter, New York City, for defendant-appellant Nalven.

Martin G. Weinberg, Boston, Mass. (Oteri, Weinberg & Lawson, Boston, Mass., of counsel), for defendants-appellants Guippone and Porcelli.

Jay Goldberg, New York City, for defendant-appellant Williams.

Theodore Krieger, New York City, for defendant-appellant Markum.

Richard A. Greenberg, New York City, for defendant-appellant Haynes.

Salvatore F. Quagliata, Ozone Park, N.Y., for defendant-appellant Harrison.

Jeffrey L. Greenup, New York City, for defendant-appellant Jenkins.

Richard A. Martin and Kate Stith Pressman, Asst. U.S. Attys., New York City (John S. Martin, Jr., U.S. Atty. for S.D. N.Y., Walter P. Loughlin, Asst. U.S. Atty., New York City, of counsel), for plaintiff-appellee.

Before LUMBARD, MANSFIELD and KEARSE, Circuit Judges.

MANSFIELD, Circuit Judge:

Defendants appeal from judgments of the Southern District of New York convicting them of federal narcotics violations arising out of the same core of operative facts. One indictment (S 81 Cr. 398) charged (1) seven of the appellants (all but Terry) and 10 others[1] with conspiracy to possess and distribute heroin and cocaine in violation of 21 U.S.C. § 846 (Count 1), (2) defendant Willard Williams with organizing and supervising a continuing criminal enterprise in violation of 21 U.S.C. § 848 (Count 2), and (3) various defendants with possession of large quantities of heroin and cocaine in violation of 21 U.S.C. § 841(a)(1) (Counts 3 to 15) and illegal use of the telephone to further the narcotics conspiracy in violation of 21 U.S.C. § 843(b) (Counts 16 to 25). Defendant Williams pleaded guilty to Count Two (criminal enterprise) preserving by stipulation three pretrial suppression claim issues for appeal.[2] The other six appellants were convicted of the conspiracy count and the related substantive offenses charged after a six-week jury trial before Judge Richard Owen.[3] We reverse the judg-

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[1] Of the 10 remaining individuals, 8 pleaded guilty before trial; one, "Bobby" James, was acquitted after trial; and one is a fugitive. One of the defendants, Paul Jenkins, who pleaded guilty before Judge John M. Cannella, and sought to join in this appeal pursuant to F.R.A.P. 28(i), did not preserve any issues for appeal. Accordingly, we affirm his conviction.

[2] Williams was sentenced to life imprisonment without parole. By separate order we reject Williams' claim that his guilty plea should be vacated because of alleged assurances with respect to the sentence he would receive.

[3] Porcelli, Guippone, and Harrison were sentenced to 30-year terms of imprisonment with lifetime special parole. Haynes and Markum received 15-year sentences of imprisonment with lifetime special parole. Nalven was sentenced to 3 years imprisonment. Williams, Porcelli, Guippone and Haynes, as previously convicted federal narcotics violators, were subject to enhanced penalties pursuant to 21 U.S.C. §§ 841(b)(1)(A) and 851.

ment convicting appellant Haynes of conspiracy and illegal use of a telephone.[4] Finding no merit in the other claims of error, we affirm the judgments convicting Williams, Porcelli, Guippone, Harrison, Markum, and Nalven.

A second indictment (S 81 Cr. 426) charged Terry in three counts with similar narcotics violations (conspiracy with Williams and another to distribute heroin and cocaine, possession with intent to distribute 19.4 grams of cocaine and diluents, use of telephone to facilitate conspiracy). After a non-jury trial before Chief Judge Constance Baker Motley, Terry was convicted of all counts and placed on probation for two years. We affirm.

Viewed most favorably to the government, *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942), the evidence showed that during the period from October 1980 to May 1981 Williams managed from his duplex apartment on East 89th Street, New York City, a continuing narcotics business in which he received and processed wholesale quantities of heroin and cocaine, re-sold these drugs to distributors, paid back the suppliers, laundering and banking the profits, and that all but one of the other seven appellants played active roles in the business, either as suppliers, purchasers, or facilitators (e.g., money launderers, drug testers). Defendants Porcelli and Guippone were the main suppliers of wholesale quantities of heroin and cocaine to Williams. The distributors included appellants Harrison, Markum, Nalven, Terry and various co-defendants. Harrison also became a supplier of cocaine to Williams when he was unable to pay Williams for the heroin he had distributed. This heroin had been supplied by Guippone and Porcelli. Nalven, in addition to

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[4] The government concedes that Haynes' term of special parole was improper. *Bifulco v. United States*, 447 U.S. 381, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980).

acting as a distributor, assisted Williams in testing for purity drugs being supplied to Williams and "laundering" some of the large cash receipts from sales, i.e., arranging to bank the funds as coming from legitimate sources.

The evidence establishing the existence and operations of the narcotics enterprise consisted mainly of (1) testimony of Drug Enforcement Administration (DEA) agents who made an initial purchase of heroin from one of Williams' distributors and engaged in months of continuous surveillance of the defendants, (2) papers and articles retrieved from bags of Williams' trash placed on the sidewalk outside his apartment for collection, (3) pen registers, photographs, video tapes and court-authorized electronic surveillance of conversations among the appellants, (4) post-arrest admissions by some defendants, and (5) articles seized at the time of arrest of some, including one kilogram of cocaine found in Williams' apartment, $400,000 in safety deposit boxes controlled by him ($14,500 of which was part of $40,000 previously paid by DEA undercover agents for the purchase of heroin), firearms and ammunition found in the premises of Harrison, Guippone and Nalven, and cocaine from Harrison's automobile.

The government's investigation into the defendants' narcotics activities began on October 24, 1980, when a DEA agent, Zenford Mitchell, purchased one-eighth of a kilogram of heroin for $40,000 from a previously-convicted narcotics dealer, Steward, who obtained the heroin from an apartment building at 307 East 89th Street, New York City, where defendant Williams, a twice-convicted narcotics distributor, rented and occupied a ground-floor duplex apartment ("J" and "1J") under the name Felix Davis, with telephones registered in other names. Further surveillance, use of an informant, and an interview with the owner of the apartment building, provided reasonable grounds for the belief that the source of the narcotics was the Williams' duplex. For instance,

Steward was seen on two occasions entering that apartment, after dialing the Williams' apartment phone number from a nearby public phone. On October 31, 1980, a week after the DEA agent's purchase of the heroin through Steward, defendants Porcelli and Guippone, previously convicted federal narcotics violators, were observed visiting the apartment, departing with a larged closed paper bag and driving off with it. More visits to the Williams' apartment by Porcelli and Guippone followed.

Noting that Williams left his garbage in a green bag closed with a brown tape in the public corridor of his apartment to be brought out to the sidewalk for pick-up by the trash collector, DEA agents periodically removed some of the bags from the sidewalk, which yielded evidence identifying Williams and incriminating him and others. Among the items recovered from the trash was a note in Williams' handwriting dealing with a large-scale heroin transaction; records in code numbers of the financial accounts of various narcotics distributors, including payments and amounts owed; wrappers for mannite, a substance used to dilute heroin; traces of cocaine; and a record of large-scale narcotics sales. Pen registers[5] connected to the Williams' phone lines from outside his apartment recorded the making and phone numbers of calls to Porcelli, Steward and Harrison. Numerous persons were observed visiting the Williams' apartment, including Harrison, Porcelli, Guippone, defendants Paul Jenkins and Bernard Henderson (from whom DEA agents had purchased heroin).

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[5] A pen register is a device installed on a telephone line outside of the subscriber's home that records the electronic impulses made when outgoing calls are dialed. The device perforates a tape, indicating the date, time, and number dialed. The tape does not show whether the receiving telephone was answered, nor whether there was any conversation. The device on Williams' telephone also determined the origin of incoming calls. See J. Carr, *The Law of Electronic Surveillance*, § 3.02[3][b][ii] at 74 (1977 and Supp. 1979).

On February 18, 1981, Judge Robert J. Ward of the Southern District of New York, upon the application of the DEA agents, approved in writing by Sanford M. Litvack, Assistant Attorney General of the United States, supported by an affidavit attesting to the foregoing information, authorized the installation of two listening devices ("bugs") in the living room (Apt. J) located downstairs in the Williams' duplex to record pertinent conversations "from the premises known as the first floor of duplex Apartment J," which was connected to the upstairs bedroom (known as "1J") by a large open stairway.[6] Thereupon police officers, posing as telephone repairmen, installed two bugs in the Williams' living room, one in a wall jack near the floor, and the other in a telephone having a standard 7-8 foot cord, which was too short to permit a person to carry the phone upstairs to Williams' bedroom unless the cord was lengthened.

Over the next few months DEA agents recorded scores of conversations in the Williams' apartment which, with the agents' surveillance and evidence already uncovered, clearly established the existence of the above-described continuous narcotics enterprise and the participation in it of all of the appellants except Haynes. Porcelli and Guippone visited the Williams' apartment on numerous occasions, carried out packages and had discussions with Williams regarding purchases of heroin and cocaine, amounts of money paid and owed, and problems in obtaining payment from Harrison. On March 6, 1981, for instance, they visited Williams, received $30,000 from him, and arranged to supply him with three-quarters of a kilogram of cocaine. On March 16, 1981, Porcelli received $30,000 from Williams and agreed to hold an eighth of a kilo of heroin for him. Although Porcelli and Guippone suspended deliveries when they discovered that their car was being sur-

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[6] The order was renewed on April 2, 1981 for an additional 30 days.

veilled in mid-March 1981 after a visit to Williams, Porcelli on April 29, 1981, resumed discussions with Williams regarding methods of continuing narcotic sales on a more secure basis to avoid government surveillance. When Porcelli was arrested on May 31, 1981, he instructed his daughter to tell his son-in-law, "George" (Valenti) to "get rid of" the narcotics. There was evidence from which it could be inferred that Porcelli had kept a "stash" of narcotics at Valenti's house. When Guippone was arrested he had 300 rounds of ammunition in his car and he denied knowing anyone named Williams or Felix Davis. However, in his wallet Guippone had several telephone numbers for Harrison in Williams' handwriting, as well as the address of Williams' daughter.

The electronic evidence against Harrison was equally incriminating and, coupled with the agents' surveillance and other evidence revealed that Harrison was one of Williams' distributors until he fell behind in payments of money owed Williams for narcotics supplied by Porcelli and Guippone, whereupon Harrison sought to deliver cocaine to Williams in lieu of cash to repay his debt. For instance, on March 12, 1981, Harrison delivered 1½ kilograms of cocaine to Williams, which proved to be unsatisfactory. Thereupon, on March 15, 1981, he delivered almost 2 kilos of cocaine to Williams. Williams was later overheard to say that on March 25, 1981, Harrison again delivered a kilogram of cocaine to Williams. When arrested, Harrison had one of Williams' phone numbers which he had obtained on a visit to the latter's apartment. A later search of Harrison's premises and car uncovered a sawed-off shotgun, hundreds of rounds of ammunition, some cocaine, and writings identified as heroin accounting sheets.

Onzelo Markum, Williams' younger brother, also known as "Junior," was taped discussing with Williams sales and deliveries of cocaine. For instance, on April 18, 1981, he advised

Williams that he was bringing over "that girl" (code term for cocaine) and arrived one-half hour later, turning the cocaine over to Williams. His name was on Williams' narcotics accounting sheets. In addition to assisting his brother in the purchase and sale of narcotics he exchanged large amounts of cash proceeds ($30,000 to $40,000 a day according to Williams) at midtown banks.

Eric Nalven played several roles in the conspiracy, including that of narcotics tester and money launderer. When Agent Mitchell made his initial purchase from Steward he was told that he could use the back room of Nalven's bar to test the heroin sold. Although Nalven conceded purchasing cocaine from Williams for personal use in small gram amounts for $100 to $200, on several occasions he visited Williams' apartment and received cocaine in quantities associated with dealing rather than personal use, i.e., a purchase for $2,000 on one occasion and on other occasions amounts of cocaine that could be subdivided on others.

There was also evidence that Nalven acted as a money exchanger and narcotics-tester for Williams. The latter stated on one occasion, in offering to pay $150 for every $10,000 laundered, that Nalven had been "getting rid of five or six [thousand] for me a week." The tapes further revealed that at times when Williams received narcotics from a supplier he would ask "Eric" to test it and advise the supplier of the results, and that Nalven showed Williams how to use a microscope, an instrument Williams used to test cocaine for purity. After Williams' arrest his microscope was found to have traces of cocaine on it. When arrested Nalven falsely told the DEA agents that he never used cocaine.

The evidence against appellant Clarence ("Legs") Haynes was almost entirely hearsay: records taken from Williams' trash referring to "Legs" along with others listed as narcotics distributors; mention by Williams of Haynes as the person who

used defendant Bobby James (who was acquitted) as a narcotics courier; and Williams' end of a conversation, purportedly with Haynes, in which Williams asked Haynes to tell Gabe McMillan[7] "about shirts (a code word for narcotics) that he had passed." The non-hearsay evidence against Haynes consisted of a short phone conversation with Williams in which the former asked "what's happening" and the latter replied "ain't nothing happening;" admissions by Haynes upon arrest that he was known as "Legs," and that he knew Williams and Harrison and had spoken with them on the telephone but not about narcotics; and an address book containing names of alleged drug traffickers and a narcotics price list, which was found in an apartment he shared with James who testified that the book belonged to him and that the entries were made by him, not Haynes.

Appellant Willie Terry, who was tried separately before Chief Judge Motley, does not challenge the sufficiency of the evidence against him, which consisted of records of telephone calls by Williams to Terry's apartment; tape-recorded conversations between the two regarding efforts to purchase narcotics; records of "Terry" narcotics transactions found in Williams' trash; vials containing cocaine residue found on Terry when arrested; and a scale, small amount of marijuana and business card with "Davis" (Williams' alias) on it, all of which were seized from his apartment during a search incident to the execution of an arrest warrant.

Judge Owen, after evidentiary hearings, denied in reasoned opinions defendants' motions to suppress evidence derived from the retrieval and search of Williams' trash and the elec-

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[7] McMillan, separately indicted, was convicted after a jury trial and sentenced to a 3-year term of imprisonment by Judge Robert W. Sweet. His conviction was affirmed by summary order on July 2, 1982. *United States v. McMillan*, 697 F.2d 300 (2d Cir. 1982).

tronic surveillance of Williams' apartment and telephone. Likewise Chief Judge Motley, after an evidentiary hearing, denied in a written opinion Terry's motion to suppress the evidence seized from his apartment.

DISCUSSION

A. CLAIMS COMMON TO ALL APPELLANTS

1. *Searches of Williams' Trash*

[1] Williams contends that the warrantless searches by DEA agents over a six-month period of his trash bags, which were set out for collectioin in sealed opaque bags, violated his reasonable expectation of privacy and that evidence so obtained tainted the legality of the electronic surveillance order.[8] We disagree.

In the absence of evidence indicating an intent by the former owner to retain some control over or interest in discarded trash, his placement of it for collection on a public sidewalk is inconsistent with the notion that he retains a privacy interest in it. His act is one of abandonment. *Abel v. United States*, 362 U.S. 217, 241, 80 S.Ct. 683, 698, 4 L.Ed.2d 668 (1960); *United States v. Vahalik*, 606 F.2d 99, 101 (5th Cir. 1979), *cert. denied*, 444 U.S. 1081, 100 S.Ct. 1034, 62 L.Ed.2d 765 (1980); *United States v. Shelby*, 573 F.2d 971, 973-74 (7th Cir.), *cert. denied*, 439 U.S. 841, 99 S.Ct. 132, 58 L.Ed.2d 139 (1978); *Magda v. Benson*, 536 F.2d 111, 112 (6th Cir. 1976) (per curiam); *United States v. Mustone*, 469 F.2d

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[8] Although all appellants join in Williams' challenge to the legality of seizure of evidence from his trash, only Williams has standing to assert that the searches violated the Fourth Amendment. *Rakas v. Illinois*, 439 U.S. 128, 133-34, 99 S.Ct. 421, 425-26, 58 L.Ed.2d 387 (1978).

970, 972 (1st Cir. 1972); *United States v. Dzialak*, 441 F.2d 212, 215 (2d Cir.), *cert. denied*, 404 U.S. 883, 92 S.Ct. 218, 30 L.Ed.2d 165 (1971); but see *People v. Krivda*, 5 Cal.3d 357, 96 Cal. Rptr. 62, 486 P.2d 1262 (1971), *remanded*, 409 U.S. 33, 93 S.Ct. 32, 34 L.Ed.2d 45 (1972), *affd on both state and federal constitutional grounds*, 8 Cal.3d 623, 105 Cal. Rptr. 521, 504 P.2d 457, *cert. denied*, 412 U.S. 919, 93 S.Ct. 2734, 37 L.Ed.2d 145 (1973).

[2] When plastic trash containers and their contents are picked up by the collector and carted to a public waste disposal area, common experience teaches that the former owner obtains no implicit assurance that the trash will remain inviolate or free from examination. Indeed, once the trash is discarded the former owner rarely has any further interest in it other than to be assured that it will not remain at his doorstep. In the rare instance when he desires to preclude inspection by others of private papers in his garbage he may do so by first shredding or burning them or by hand-delivering the papers to a garbage-grinding machine. We do not view the mere use of taped opaque containers as indicating an intent to retain a privacy interest; these containers, apparently the most commonly-available type sold, are obviously designed to assure tidiness in appearance rather than privacy.[9] Such containers are hardly safety deposit boxes. In any event, even though the presence of other circumstances may indicate an intent to retain a privacy interest in trash (e.g., written restrictions on containers or retention of containers on private property until collected), the circumstances in this case clearly evidence abandonment by Williams of his trash. Accordingly, we affirm the district court's denial of his motion to suppress the evidence seized from the trash searches.

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[9] Since items found in closed containers during a lawful search do not require a separate warrant, *United States v. Ross*, ___ U.S. ___, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982), *a fortiori*, there is no requirement to obtain a warrant to search sealed items that are discarded on a public street for collection.

2. *Challenges to Electronic Surveillance in Williams' Apartment*

All appellants challenge on several grounds the court-authorized electronic surveillance in Williams' apartment. Their first ground, that evidence derived from illegal trash searches was used to obtain the eavesdropping order, is rejected for reasons already stated and because the application for the order disclosed probable cause independent of the trash-derived evidence. See *Franks v. Delaware*, 438 U.S. 154, 171-72, 98 S.Ct. 2674, 2684-85, 57 L.Ed.2d 667 (1978).

[3] Appellants next contend (1) that the affidavit supporting the original application for the room bugs was inadequate because it did not assert that all other less intrusive investigative techniques were unlikely to succeed as is required by 18 U.S.C. §§ 2518(1)(c) and (3)(c),[10] and (2) that the order renewing the authorization for an additional 30 days was invalid because the supporting affidavit was a mere "boilerplate" repitition of the facts set forth in the earlier affidavit.

We hold that the affidavits were adequate. The original affidavit disclosed the standard investigative procedures that had been tried and explained why their continued use would be unproductive. It explained that Williams rarely left his apartment and would not meet with someone he did not know; that a search of his apartment would not reveal his narcotics stash which he kept nearby; and that the co-conspirators

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[10] Title 18 U.S.C. § 2518(1)(c) provides that an application for an order for interception of wire or oral communications shall include "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." Section 2518(3)(c) requires the judge in an ex parte order authorizing the interception to determine on the basis of the facts submitted by the applicant that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous."

previously contacted, Jones and Steward,[11] had become suspicious and refused to deal further with undercover agents. The affidavit further indicated the agents' inability through physical surveillance to establish the significance of the meetings between the suspects; a record of their conversations was therefore essential.

[4-6] An affidavit describing the standard techniques that have been tried and facts demonstrating why they are no longer effective is sufficient to support an eavesdropping order even if every other possible means of investigation has not been exhausted. *United States v. Todisco*, 667 F.2d 255, 258-59 (2d Cir. 1981), *cert. denied*, 455 U.S. 906, 102 S.Ct. 1251, 71 L.Ed.2d 444 (1982); *United States v. Vazquez*, 605 F.2d 1269, 1282 (2d Cir.), *cert. denied*, 444 U.S. 981, 100 S.Ct. 484, 62 L.Ed.2d 408 (1979) (quoting *United States v. Hinton*, 543 F.2d 1002, 1011 (2d Cir.), *cert. denied*, 429 U.S. 980, 97 S.Ct. 493, 50 L.Ed.2d 589 (1976)). Agents are not required to resort to measures that will clearly be unproductive. When, as here, a defendant (Williams) conducts his narcotics business only on a face-to-face basis from his apartment, it is unnecessary for government investigators first to seek a wiretap before applying for an eavesdropping order since a bug, not a wiretap, would provide the evidence sought. Since the factual justification for the order had not changed at the time when an extension was sought, it was unnecessary to vary the specific facts, admittedly accurate, in the renewal application. *Todisco, supra*, 667 F.2d at 259.

Appellants next argue that the order should be invalidated because it was signed by an Assistant Attorney General who lacked authority. We disagree. On January 19, 1981, the last day of the administration of President Carter, the then Attor-

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[11] Steward was charged in a separate indictment. Jones was an unindicted co-conspirator.

ney General Benjamin Civiletti executed Order No. 931-81 pursuant to 18 U.S.C. § 2516(1)[12] designating the four Assistant Attorneys General in charge of the Criminal Division, the Tax Division, the Office of Legal Counsel, and the Antitrust Division, in that order, to exercise the power of the Attorney General, in his absence, to authorize appropriate applications for electronic surveillance by federal agencies. Each designee was authorized to exercise the power in the event all those listed ahead of him were "not in the District of Columbia or . . . otherwise not available."

Civiletti was replaced the following day, January 20, 1981, by Attorney General William French Smith when the new administration took office. On February 2, 1981, hold-over Assistant Attorney General Sanford M. Litvack, head of the Antitrust Division and fourth on Civiletti's priority list of assistants, authorized an application for court-ordered electronic surveillance of Williams' apartment. On February 27, 1981, Attorney General Smith issued his own designation Order No. 934-81, which did not expressly redesignate the authorization of his predecessor.

[7] Appellants first contend that the Litvack authorization on February 2 was inadequate because it failed to recite the necessary precondition to Litvack's exercise of power, namely that the three other Assistant Attorneys General with higher priority in the Civiletti order were absent or otherwise unavailable. We reject this contention. Litvack, a named designee whose high office gave him statutory power to authorize electronic surveillance orders, is presumed to have properly exercised that power and the condition precedent is presumed to have been met unless the defendants offer evi-

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[12] Title 18 U.S.C. § 2516(1) provides that "[t]he Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge . . . for . . . an order authorizing or approving the interception of wire or oral communications. . . ."

dence, apart from mere conjecture or speculation, to rebut this presumption. *United States v. Todisco*, 667 F.2d at 259; *United States v. Jabara*, 618 F.2d 1319, 1327 (9th Cir.), *cert. denied*, 446 U.S. 987, 100 S.Ct. 2973, 64 L.Ed.2d 845 (1980); *United States v. Turner*, 528 F.2d 143, 151 (9th Cir.), *cert. denied*, 423 U.S. 996, 96 S.Ct. 426, 45 L.Ed.2d 371 (1975). No such evidence was offered in this case.

[8, 9] Appellants further claim that Order No. 931-81 was invalid because Assistant Attorney General Litvack's power as a designee of Attorney General Civiletti had expired when Mr. Civiletti left office and was no longer responsive to the political process as required by *United States v. Giordano*, 416 U.S. 505, 520, 94 S.Ct. 1820, 1829, 40 L.Ed.2d 341 (1974). This claim is meritless. Unlike *Giordano*, there is no suggestion here that Assistant Attorney General Litvack did not sign the order approving the application or that he was not specially designated by Mr. Civiletti. Administrative continuity requires that the designation by an outgoing Attorney General of Assistants to authorize electronic surveillance remain valid at least for a reasonable time after the Attorney General leaves office, even without an express redesignation by his successor. *Todisco*, 667 F.2d at 259 (citing *In re Weir*, 520 F.2d 662, 667 (9th Cir. 1975); *United States v. Mallory*, 507 F.Supp. 99, 102 (D.Md. 1981). Otherwise the power of the office of Attorney General would in this important respect grind to a halt when an incumbent Attorney General departed and thereafter remain paralyzed until his successor was sworn in and acted. That the change in office resulted from a change in administration, with a possibly different electronic surveillance policy, does not alter the principle of administrative continuity when, as here, the incumbent Attorney General on February 27, 1981, impliedly ratified the designation of his predecessor, thereby eliminating the possibility that prior electronic surveillance policy could escape review by a politically accountable official of the current administration.

[10] Appellants next argue that the two eavesdropping devices ("bugs"), which were placed in the downstairs living room of Williams' duplex apartment, intercepted conversations that occurred upstairs in the apartment. Appellants argue that the interception of upstairs conversations violated both Judge Ward's order, which authorized interception of conversations "from the premises known as the first floor of duplex Apartment J," and the Fourth Amendment, which requires that search warrants "particularly describ[e] the place to be searched."

In the district court appellants originally contended that the bugs were unlawfully placed upstairs in violation of Judge Ward's order. They have abandoned this claim in the face of overwhelming contrary evidence. They now argue that the eavesdropping tapes should have been suppressed on the ground that since noises from Williams' TV set, claimed to have been at all times upstairs, and comments claimed to have been uttered upstairs were audible on the tapes the government must have violated the eavesdropping order by installing a bug in a downstairs phone with a long extension cord that might be carried upstairs and thus pick up conversations there. Alternatively they argue that even if upstairs noises were overheard by accident the entire tapes should have been suppressed. We reject both arguments.

After extensive oral hearings, in which Williams and the agents who installed the bugs testified, Judge Owen found that there were no bugs installed upstairs, that a bug with a standard 10-15 foot range was installed downstairs in a standard beige phone, described by the installer, Officer Meyers, as having a 7-8 foot cord, and that this installation was in compliance with Judge Ward's order. Although DEA agents, when they entered the apartment months later on May 31, 1981 (after the narcotics ring was broken by arrests), noted that the downstairs beige phone now had a 12 to 15 foot cord,

this could not be attributed to the government (since the officers installed the phone on a 7 to 8 foot cord) but may have been the work of Williams, who admittedly extended the cord of one of the phones. Although Williams testified that the extension installed by him was not on the beige phone, the court stated that "the tortuous testimony of . . . Williams I utterly reject as false." These findings are not clearly erroneous.

[11-13] In any event, since Judge Ward's order authorized interception of narcotics-related conversations "from" the downstairs it permitted the investigators to intercept such communications as might be audible by an unenhanced bug in the living room, even though they originated from the bedroom and could be heard downstairs because of the open stairway between the rooms.[13] Moreover, the faint television and other noises claimed (but not shown) to have emanated from the bedroom were insignificant. Judge Owen found that of nearly 200 taped conversations introduced into evidence, none appeared to have originated from upstairs, thus confirming evidence that the investigating agents took reasonable steps to limit interception to narcotics-related conversations originating in the living room downstairs. This satisfied the standard, which is that agents observe reasonable safeguards against excessive intrusion. *Scott v. United States*, 436 U.S. 128, 139-43,

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[13] Cf. *United States v. Sellaro*, 514 F.2d 114, 124 (8th Cir. 1973), *cert. denied*, 421 U.S. 1013, 95 S.Ct. 2419, 44 L.Ed.2d 681 (1975) (order authorizing interception of communications *from* telephones encompasses authorization to intercept both incoming and outgoing calls).

The government gave the agents monitoring the wiretap at Willams' apartment instructions to intercept only conversations in the living room. Judge Owen ruled that the government's "overly restrictive interpretation" of the scope of the agents' authority did not bind the court in construing Judge Ward's order. Even assuming the agents were under a statutory duty to minimize recordings of conversations beyond the scope of the authorization, the trial court found that they did so out of an excess of caution. See 18 U.S.C. § 2518(5).

98 S.Ct. 1717, 1724-26, 56 L.Ed.2d 168 (1978); *United States v. Tortorello*, 480 F.2d 764, 784-85 (2d Cir.), *cert. denied*, 414 U.S. 866, 94 S.Ct. 63, 38 L.Ed.2d 86 (1973); see also, *United States v. Rizzo*, 491 F.2d 215, 217 n.7 (2d Cir.), *cert. denied*, 416 U.S. 990, 94 S.Ct. 2399, 40 L.Ed.2d 769 (1974).

Our holding does not convert the electronic surveillance order into a general warrant in violation of the Fourth Amendment requirement that search warrants particularly describe the things to be seized. Here the order specifically authorized the interception of audible narcotics-related conversations by named individuals and some unknown within a designated area. This satisfied Fourth Amendment requirements. See *Steele v. United States*, 267 U.S. 498, 503-04, 45 S.Ct. 414, 416-17, 69 L.Ed. 757 (1925), incorporated in Title III, 18 U.S.C. §§ 2518(1)(b)(i)-(iv) and 2518(4)(a)-(e).

3. *Custody of the Original Tapes*

[14] We find equally meritless appellants' contention that in violation of Fed.R.Crim.P. 16(a)(1)(C)[14] and their constitutional rights to confrontation and due process they were denied access to the original tape recordings made from Williams' apartment. Appellants were given copies of the tapes which had been enhanced to promote audibility. In addition, the prosecutor made the original tapes available to appellants and their experts for analysis in his office. However, appellants declined this offer, seeking instead to analyze the original tapes outside the government's custody but with a government

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[14] Rule 16(a)(1)(C) provides:

> "Upon request of the defendant the government shall permit the defendant to inspect and copy . . . tangible objects . . . which are within the possession, custody or control of the government, and which are material to the preparation of his defense or are intended for use by the government as evidence in chief at the trial. . . ."

agent present. In the absence of any plausible evidence indicating an alteration or distortion of what was recorded on the tapes and in light of the trial court's finding of authenticity and accuracy, the request to remove this fragile evidence from the government's custody was unwarranted. *United States v. Fuentes*, 563 F.2d 527, 532 (2d Cir.), *cert. denied*, 434 U.S. 959, 98 S.Ct. 491, 54 L.Ed.2d 320 (1977).[15]

4. *The Court's "Community Impact" Instruction*

[15] Over defense objection, the district court charged the jury:

> "If, ladies and gentlemen, you fail to find beyond a reasonable doubt that the law has been violated as to any charge by a defendant, you should not hesitate for any reason to return a verdict of acquittal. If, on the other hand, you should find that the law has been violated as charged by a defendant in any count, *you should not hesitate* because of sympathy of other reason *to return a verdict of guilty as a clear warning that a crime of this character may not be committed with impunity. The public is entitled to be insured of this.*" (Emphasis added.)

Appellants contend that the italicized portion amounted to impermissible judicial advocacy, *Quercia v. United States*, 289 U.S. 466, 470-71, 53 S.Ct. 698, 699, 77 L.Ed. 1321 (1933); *United States v. Araujo*, 539 F.2d 287, 290 (2d Cir.), *cert. de-*

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[15] Even if, as Guippone and Porcelli claim, their conversations relating to gambling had been omitted from the recordings played to the jury, such omissions would not impugn the integrity of the tapes that were heard by the jury, which related to narcotics. Moreover, appellants made no objection at trial that the recordings were unfairly incomplete.

nied, 429 U.S. 983, 97 S.Ct. 498, 50 L.Ed.2d 593 (1976), diverting the jury's focus from consideration of individual proof to questions of public policy. Cf. *United States v. Cheung Kin Ping*, 555 F.2d 1069, 1073-74 (2d Cir. 1977).

Although we long ago held that the giving of a "community impact" instruction was not reversible error, *United States v. Witt*, 215 F.2d 580, 585 n.4 (2d Cir.), *cert. denied*, 348 U.S. 887, 75 S.Ct. 207, 99 L.Ed. 697 (1954), we have disapproved of similar statements when made by a prosecutor as tending to divert the jury from consideration of the evidence, *United States v. Barlin*, 686 F.2d 81, 93 (2d Cir. 1982). For the same reason we find no useful purpose to be served by the challenged instruction.[16] However, since the evidence in the present case was overwhelming against all defendants except Haynes, whose conviction is reversed on other grounds, and the instruction received no prominence, the error was harmless and did not deprive the defendants of a fair trial. *Barlin*, *supra*, 686 F.2d at 93; *United States v. Modica*, 663 F.2d 1173, 1182 (2d Cir. 1981), *cert. denied*, ____ U.S. ____, 102 S.Ct. 2269, 73 L.Ed.2d 1284 (1982); *United States v. Birnbaum*, 373 F.2d 250, 263 (2d Cir.), *cert. denied*, 389 U.S. 837, 88 S.Ct. 53, 19 L.Ed.2d 99 (1967).

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[16] The "community impact" charge cannot be equated with the "province of the jury" charge under which the jury is told:

> "You are to perform this duty [to try the issues of fact] without bias or prejudice as to any party. The law does not permit jurors to be governed by sympathy, prejudice, or public opinion. Both the accused and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the Court and reach a just verdict regardless of the consequences."

This charge has been approved by us as "standard" and proper, *United States v. Ramirez*, 482 F.2d 807, 816 (2d Cir.), *cert. denied*, 414 U.S. 1070, 94 S.Ct. 581, 38 L.Ed.2d 475 (1973). In contrast to the "community impact" instruction, it directs the jury *not* to consider public opinion. See 1 J. Devitt & C. Blackmar, *Federal Jury Practice and Instructions*, § 11.03, at 293 (3d ed. 1977).

B. Admission of Evidence of Defendants' Refusal to Furnish Palm Prints

Four appellants (Porcelli, Guippone, Harrison and Markum) contend that the trial judge erred in admitting testimony as to their refusal to supply palm prints as evidence of consciousness of guilt without permitting them to elicit that they had refused because they first wanted advice of counsel. Appellants argue that exclusion of evidence of their explanation violated the "doctrine of completeness" as reflected in Fed.R.Evid. 106[17] because the evidence was admissible as proof of their "state of mind," Fed.R.Evid. 803(3).

On two occasions the government attempted pursuant to court order to obtain palm prints from Porcelli, Guippone, Harrison, Markum, and Williams, to determine whether any of their prints matched a latent palm print found on a paper bag containing heroin which was seized on the day of their arrests. Appellants refused, stating that they would not supply prints in the absence of their lawyers. At trial the government sought to introduce the refusal as evidence of appellants' consciousness of guilt and to explain why the government's fingerprint expert had not identified the latent print after that fact had been brought out by defense counsel. Appellants objected to the admission of the evidence unless they were permitted to elicit that they had contemporaneously expressed the desire to consult counsel. The district court ruled that the latter assertions were inadmissible hearsay and unnecessary for a fair understanding of the evidence of refusal, since the government

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[17] Fed.R.Evid. 106 provides:

> "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

might "take prints as a matter of right[ ]," and appellants had "no legal basis of any kind to refuse prints." The court indicated that the defendants could offer their explanation by their own testimony. At the close of trial the court instructed the jury that the refusal to supply palm prints could provide evidence of the defendants' consciousness of guilt.

[16] The government has a right to obtain prints pursuant to a lawful custodial arrest, see *United States v. Doe*, 457 F.2d 895, 898-99 (2d Cir. 1972), *cert. denied*, 410 U.S. 941, 93 S.Ct. 1376, 35 L.Ed.2d 608 (1973), without the presence of counsel, *United States v. Ash*, 413 U.S. 300, 313, 93 S.Ct. 2568, 2575, 37 L.Ed.2d 619 (1973) (no right to counsel at post-indictment photograph display for purposes of allowing a witness to attempt an identification), and appellants' refusal to provide prints was admissible as evidence of consciousness of guilt. *United States v. Nix*, 465 F.2d 90, 93-94 (5th Cir.), *cert. denied*, 409 U.S. 1013, 93 S.Ct. 455, 34 L.Ed.2d 307 (1972).

[17] Testimony regarding appellants' statements that they desired counsel would be excludable as hearsay, Fed.R.Evid. 802, unless admissible under an exception to the hearsay rule. Admission was not mandated by Fed.R.Evid. 106 (doctrine of completeness) since that rule applies only to writings, not oral statements; in any event Rule 106 does not render admissible evidence that is otherwise inadmissible. However, the evidence was admissible under the exception to the hearsay rule provided by Fed.R.Evid. 803(3),[18] since appellants' contemporaneous statements were relevant to the issue of their state of mind, i.e., whether they had a consciousness of guilt in refusing to furnish the prints or were acting in good faith.

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[18] Fed.R.Evid. 803(3) excepts from the Hearsay Rule "[a] statement of the declarant's then existing state of mind. . . ."

It was therefore error to exclude the proof which appellants sought to elicit. However, the error was harmless and did not affect appellants' substantial rights in view of the overwhelming proof of their guilt, Fed.R.Crim.P. 52(a). Moreover, any prejudice was minimized by the fact that, notwithstanding the court's evidentiary ruling, defense counsel, in defiance of that ruling and despite the court's admonitions, sought by questions to convey to the jury that appellants had refused to furnish prints until they had advice of counsel.

C. Individual Claims of Porcelli and Guippone

[18] Porcelli and Guippone contend that the evidence was insufficient to support their convictions of substantive offenses (possession on March 6, 1981, of three-quarters of a kilogram of cocaine with intent to distribute (Count Seven) and possession of one-eighth of a kilogram on March 16, 1981 (Count Nine)). In view of the overwhelming evidence of guilt this claim is rejected. Examined in the light most favorable to the government, *Glasser v. United States*, *supra*, 315 U.S. at 80, 62 S.Ct. at 469; *United States v. Stirling*, 571 F.2d 708, 734 (2d Cir.), *cert. denied*, 439 U.S. 824, 99 S.Ct. 93, 58 L.Ed.2d 116 (1978), the record shows that on March 6, 1981, Porcelli and Guippone agreed in response to Williams' request for "rock" (cocaine) to send him "three-quarters" of a kilogram of "Peruvian flake" (cocaine) they had received from a friend, which had come out "like feathers" (good quality). Similarly, on March 16, 1982, Porcelli agreed with Williams to "bring down the eighth" (eighth of a kilogram). The jury was entitled from the surrounding circumstances, including Williams' expressed need for heroin on the previous day (March 15), and his statement a day later (March 17) that he had paid $30,000 for "boy" (code name for heroin) the night before, to

find beyond a reasonable doubt that the substance purchased from Porcelli on March 16 was heroin. There was also ample evidence that the quantities were kilograms, not grams for personal use, and that the crimes occurred within the Southern District of New York. *United States v. Panebianco*, 543 F.2d 447, 455 (2d Cir. 1976), *cert. denied*, 429 U.S. 1103, 97 S.Ct. 1129, 51 L.Ed.2d 553 (1977).

[19] Their "boilerplate claim" that the proof disclosed multiple conspiracies rather than the single conspiracy charged, see *United States v. McGrath*, 613 F.2d 361, 367 (2d Cir. 1979), *cert. denied*, 446 U.S. 967, 100 S.Ct. 2946, 64 L.Ed.2d 827 (1980), must also be rejected. The trial court's charge on conspiracy followed that approved by us, *United States v. Tramunti*, 513 F.2d 1087, 1107 (2d Cir.), *cert. denied*, 423 U.S. 832, 96 S.Ct. 54, 46 L.Ed.2d 50 (1975). The question of multiple or single conspiracies is one of fact, *United States v. Alessi*, 638 F.2d 466, 472 (2d Cir. 1980). Accepting the proof as we must in the light most favorable to the government, *United States v. Murray*, 618 F.2d 892, 902 (2d Cir. 1980); *United States v. Armedo-Sarmiento*, 545 F.2d 785, 789 (2d Cir. 1976), *cert. denied*, 430 U.S. 917, 97 S.Ct. 1330, 51 L.Ed.2d 595 (1977), the evidence was sufficient to permit the jury to find the existence of a single, large-scale, "chain-type" narcotics operation whose central link was Williams' apartment on East 89th Street.

Porcelli and Guippone agreed to further the aims of Williams' narcots enterprise by supplying him with large quantities of heroin and cocaine for which they received large sums of money. They were aware of the size of the middleman Williams' operation, *United States v. Armedo-Sarmiento*, 545 F.2d at 790; *United States v. Panebianco*, 543 F.2d at 453, and knew their supply of narcotics would not stop with him. Indeed, they frequently discussed the fortunes of one of his distributors in the venture, Harrison, who was late in his pay-

ments. Thus, Porcelli and Guippone depended on Williams to collect money due them from Harrison, and Williams depended on Porcelli and Guippone to keep him in steady supply.

When Porcelli and Guippone refused to come to Williams' apartment for five weeks, suspecting danger, Williams could not obtain heroin. The three exchanged reciprocal warnings, reinforcing the existence of their interdependence and mutual assistance, thus warranting treatment of their dealings as a single business venture. *United States v. Tramunti*, *supra*, 513 F.2d at 1106. The temporary hiatus that occurred while the three waited for the danger to pass did not transform the single ongoing conspiracy into two conspiracies since there was nothing to indicate that any of them viewed their mutual dealings as having terminated. *United States v. Panebianco*, *supra*, 543 F.2d at 452. On the contrary, during the period when Porcelli and Guippone were lying low, Williams made repeated efforts, including a meeting with Porcelli, to arrange alternative meeting places to honor Porcelli and Guippone's demand, which was not that they cease doing business together, but that they meet in the Bronx. Similarly, the record is clear that appellants Porcelli and Guippone never withdrew from the conspiracy; they merely wanted to switch its locale. Consequently, their claim that statements of co-conspirators after March 16, 1981 should have been excluded is frivolous. *United States v. Schwenoha*, 383 F.2d 395, 396-97 (2d Cir. 1967), *cert. denied*, 390 U.S. 904, 88 S.Ct. 817, 19 L.Ed.2d 869 (1968); *United States v. Borelli*, 336 F.2d 376, 388-89 (2d Cir. 1964), *cert. denied*, 379 U.S. 960, 85 S.Ct. 647, 13 L.Ed.2d 555 (1965).

[20] We also reject as meritless Porcelli's contention that Judge Owen erred in ruling that he would, if Porcelli took the stand, admit Porcelli's 20-year old narcotics conviction on the issue of intent and guilty knowledge, Fed.R.Evid. 404(b). The ruling was correct in view of the claim of Porcelli's counsel

in his opening statement that the telephone conversations with Williams related to gambling, not narcotics, and Porcelli's refusal to remove this issue from dispute by stipulating that the terms used in the taped conversations referred to narcotics. *United States v. Reed*, 639 F.2d 896, 906-07 (2d Cir. 1981); *United States v. Figueroa*, 618 F.2d 934, 941-43 (2d Cir. 1980); *United States v. Mohel*, 604 F.2d 748, 753-55 (2d Cir. 1979).

Porcelli and Guippone's remaining contentions are without merit. We therefore affirm their convictions.

D. Harrison's Claims

[21, 22] Harrison contends that he was deprived of a fair trial because of prosecutorial misconduct. His first claim is that when Agent Hubert Shockley hesitated in making an in-court identification of him as the person seen entering Williams' apartment on March 15, 1981, to arrange delivery of two kilograms of cocaine, the prosecutor aided Shockley by using his eyes to point toward Harrison at the counsel table. Both the prosecutor and Shockley denied any such improper collaboration. Moreover, the court found first that any hesitation in making the identification was attributable to the fact that Harrison's face was blocked from the witness by his counsel's open briefcase. Second, the court found that any change in the prosecutor's facial expression was caused by his astonishment when, just as the witness was looking for Harrison, defendant Haynes inexplicably rose to his feet, directing attention away from Harrison to himself. Since the question of what occurred in the courtroom in the presence of judge and jury is one of fact, we fail to find sufficient support, in view of the trial judge's comments, for the misconduct claim. In any event, there was abundant other independent evidence that

Harrison was the speaker in the March 15 conversation with Williams regarding the delivery of cocaine.[19] Under the circumstances we also reject the claim that the trial judge abused his discretion in ordering Harrison after the incident to give a voice exemplar.

[23] Nor is there any merit in the claim that the prosecutor acted improperly in questioning on cross-examination Harrison's "voice expert" witness, Louis Gerstman, regarding prior occasions when his testimony in other cases had been criticized by the court as unworthy of belief. Proof that a judge of the District of Columbia Superior Court before whom Gerstman had testified as an expert had found that Gerstman had "guessed under oath" was probative of the weight to be accorded to his testimony. Fed.R.Evid. 608(b), 613(a).[20]

[24, 25] Harrison's claim that the court erred in admitting identification testimony by Frank Lucas, a three convicted narcotics dealer, borders on the frivolous. The evidence was relevant to establish Harrison's residence, a material fact, and

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[19] This evidence included testimony of another government agent who had spoken to Harrison on the day of his arrest and identified the voice in the March 15 conversation as that of Harrison. Harrison also admitted that he was known as "Harry," the name by which he was addressed by Williams at their March 15 meeting.

[20] Fed.R.Evid. 608(b) provides in relevant part:

> "Specific instances of the conduct of a witness, for the purpose of attacking . . . his credibility, . . . may . . . in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness. . . ."

Fed.R.Evid. 613(a) provides:

> "In examining a witness concerning a prior statement made by him, . . . the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel."

to identify his voice on the March 15, 1981 tape after Harrison had refused to stipulate that he was the speaker whom Williams greeted as "Harry." Lucas' allegedly prejudicial testimony regarding his own sordid history was elicited by Harrison's own counsel, over the government's objection. Harrison thus waived any possible claims based on the prosecutor's reference to the testimony in summation by his failure to object. *United States v. Clemente*, 640 F.2d 1069, 1081 (2d Cir. 1981), *cert. denied*, 454 U.S. 820, 102 S.Ct. 102, 70 L.Ed.2d 91 (1981).

We find no merit in Harrison's other contentions. His conviction accordingly is affirmed.

E. Markum's Claims

[26, 27] Markum claims that the testimony of the government witness Frank Lucas regarding Lucas' own narcotics history and attempts to bribe state court judges, which was adduced on cross-examination by Harrison's counsel over government objection, should have been excluded under Fed.R.Evid. 403 on the ground that its prejudicial impact outweighed its probative value, or that a limiting instruction as to Markum should have been given under Fed.R.Evid. 105, or a severance granted under Fed.R.Crim.P. 14. The claim is meritless. Lucas' testimony linked Harrison to the conspiracy. A limiting instruction was unnecessary since the impeaching testimony brought out on cross-examination related exclusively to Lucas and could not possibly have been attributed by the jury to Markum or any other defendant. Moreover, any possible error would have been harmless beyond a reasonable doubt in view of the abundant independent evidence of Markum's guilt, particularly his frequent and highly incriminating conversations with Williams about narcotics.

[28] We also reject Markum's claim that the trial judge erred in considering Markum's perjured testimony in imposing sentence. *United States v. Grayson*, 438 U.S. 41, 50-51, 98 S.Ct. 2610, 2615-16, 57 L.Ed.2d 582 (1978). His conviction is accordingly affirmed.

F. Nalven's Claims

Relying mainly on *Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 1884-85, 68 L.Ed.2d 378 (1981), Nalven claims that the court erred in admitting a false exculpatory statement made by him upon his arrest. He asserts that the interrogation violated his Sixth Amendment right to counsel.

DEA agents, after arresting Nalven, read him his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and asked him whether he wished to waive them, to which he replied that he did not. He did not request a lawyer. Some 40 minutes later, at DEA headquarters, an Assistant U.S. Attorney again read to Nalven his *Miranda* rights and asked him if he had ever taken drugs. He replied that he had not. When further interrogation was attempted he responded that he would have nothing to say until he spoke with an attorney, whereupon questioning ceased. At trial, in rebuttal to Nalven's testimony that he bought small amounts of cocaine as a recreational user of cocaine, not a co-conspirator, *United States v. Swiderski*, 548 F.2d 445, 450 (2d Cir. 1977), the government sought to impeach him by introducing his earlier answer. The trial court concluded that in giving this answer Nalven knowingly waived his rights until he decided not to talk further before consulting counsel. We agree.

[29, 30] *Edwards v. Arizona*, *supra*, held only that it was impermissible to infer a waiver by an accused of his Sixth Amendment right to counsel after he "has clearly asserted his

right to counsel," 451 U.S. at 485, 101 S.Ct. at 1885. Further interrogation would then be inconsistent with *Miranda*. However, unless and until the accused asks for a lawyer he may waive his procedural *Miranda* rights, see *Michigan v. Mosley*, 423 U.S. 96, 104 n.10, 96 S.Ct. 321, 326 n.10, 46 L.Ed.2d 313 (1975); *id.* at 109-11, 96 S.Ct. at 329-30 (White, J., concurring). Prior to the accrual of the right to counsel, the standard for waiver is whether under the facts and circumstances of the case, including the accused's background and conduct, he understands the right in question and voluntarily intends to relinquish it. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938).

[31] In the hearing as to the voluntariness of Nalven's statement, Nalven acknowledged that when he was read his rights by the Assistant United States Attorney he understood each one of them. He understood that he did not have to answer any questions, that anything he said could be used against him, and that he had a right to have an attorney before proceeding any further. Nalven confirmed, too, that he had acknowledged understanding those rights at the time he was advised of them. Since Nalven's rights were scrupulously respected at every stage, with interrogation terminated immediately upon his stating that he wanted to consult a lawyer, and there is no suggestion that he was subjected to lengthy questioning or other improper tactics, the finding of a waiver with respect to his statement concerning his use of narcotics must be upheld. *Michigan v. Mosley*, *supra*, 423 U.S. at 105-06, 96 S.Ct. at 327.

[32] In any event, even if the admission of the false exculpatory statement had been error it would have been harmless beyond a reasonable doubt, since the statement formed but a minuscule part of the evidence against Nalven, which included repeated purchases of substantial amounts of cocaine from Williams, statements referring to Nalven's role as a tester and

money launderer, and direct evidence of his assistance to Williams in the use of the microscope to examine cocaine.

Nalven also claims that the trial judge erred in admitting into evidence his licensed gun, a Walther PPK 9 millimeter pistol, and 300 rounds of hollowed out "dum-dum" bullets seized from his basement office at the times of his arrest. We disagree.

[33, 34] The trial court's determination that the probative value of admission of a weapon outweighs the danger of unfair prejudice will be upheld unless arbitrary or irrational. *United States v. Robinson*, 560 F.2d 507, 514-15 (2d Cir. 1977), *cert. denied*, 435 U.S. 905, 98 S.Ct. 1451, 55 L.Ed.2d 496 (1978). The government charged that Nalven let his bar be used for substantial narcotics transactions. Before the admission of the weapon, DEA agents testified that the bar was the site of their initial heroin purchase from Steward, that the agent was told then that the bar was "safe" and that the back room could be used to count money and check the "dope," and that the bar was later used by Nalven to test drugs for Williams. That the gun and ammunition were found in the basement rather than in the bar could have supported the conclusion that Nalven intended their use for protection, not of his bar, but of other business. While the possession of a licensed gun, standing alone, might have no relevance to illegal narcotics business, here the location of the weapon and the special type of ammunition found with it (deadly hollowed out "dum-dum" bullets) supported the inference that these were instruments of the narcotics trade. See *United States v. Wiener*, 534 F.2d 15, 18 (2d Cir.), *cert. denied*, 429 U.S. 820, 97 S.Ct. 66, 50 L.Ed.2d 80 (1976).

Under the circumstances we cannot say that the trial judge's determination was irrational. Moreover, since the jury was aware that Nalven had a license for the gun there was less danger that jurors would be tempted to punish him for pos-

session of the gun rather than for the offense charged. See *Robinson*, 560 F.2d at 513-14.

G. Terry's Claims

[35] Terry prudently does not question the sufficiency of the overwhelming evidence of his guilt. However, he does claim that the trial court erred in failing to suppress the set of scales (of the type used to weigh narcotics being cut or packaged), some marijuana, and a business card, all of which were seized from his apartment during the execution of a warrant for his arrest. Terry argues that the police lacked sufficient reason to believe that he was at home and therefore they could not lawfully enter his apartment. *Payton v. New York*, 445 U.S. 573, 602-03, 100 S.Ct. 1371, 1388, 63 L.Ed.2d 639 (1980). Because those items formed part of the basis for the subsequent issuance of a warrant for the search of his apartment, which uncovered other incriminating evidence, he contends that the search warrant was tained. Terry also claims that the police extended their stay beyond the time necessary to secure the premises and that the seizure of the business card, which occurred some 15-20 minutes after the agents' arrival on the premises was invalid. We disagree.

Armed with a valid arrest warrant, the agents had the right to enter the Terry apartment if they had a reasonable basis for believing Terry was there. *Payton v. New York*, 445 U.S. at 602-03, 100 S.Ct. at 1388; *United States v. Spencer*, 684 F.2d 220, 222-23 (2d Cir. 1982). They had sufficient information to justify their belief in Terry's presence. The telephone at the apartment was listed to Doris Terry. A man named Terry had spoken to Williams from that apartment. When the agents arrived at the apartment building, a 12-year old boy wearing a shirt with the name "Terry" on it told them his father and

mother lived in the apartment and did not indicate that his father was not at home. Moreover, the agents arrived at the apartment at 8:45 A.M. on a Sunday morning, a time when they could reasonably believe that Terry would be home. We have rejected the contention that the police must first conduct a thorough investigation to obtain evidence of an arrestee's actual presence before entering his residence. *United States v. Manley*, 632 F.2d 978, 984 (2d Cir. 1980), *cert. denied*, 449 U.S. 1112, 101 S.Ct. 922, 66 L.Ed.2d 841 (1981).

[36] Once lawfully in the apartment the agents were entitled to make a limited security check of the premises, *id.*, 632 F.2d at 986; *United States v. Gomez*, 633 F.2d 999, 1008 (2d Cir. 1980), *cert. denied*, 450 U.S. 994, 101 S.Ct. 1695, 68 L.Ed.2d 194 (1981). The crucial incriminating items — the scale, marijuana, and business card — were lawfully seized during the check because they were within the officers' plain view. *Washington v. Chrisman*, 455 U.S. 1, 5-6, 102 S.Ct. 812, 815-16, 70 L.Ed.2d 778 (1982); *Spencer*, *supra*, 684 F.2d at 224. As long as agents did not enter because they had advance knowledge of these items, their discovery was inadvertent. See *United States v. Liberti*, 616 F.2d 34, 37 (2d Cir.), *cert. denied*, 446 U.S. 952, 100 S.Ct. 2918, 64 L.Ed.2d 808 (1980). Terry argues that the scale could not have been in plain view because the DEA agent who seized it had to walk over to the box and look into it before determining that the box contained a scale. However, since the outside of the box itself, which was in plain view, bore the name "OHAUS," the name of a balance scale frequently used in narcotics dealing, and the open box revealed part of the scale with white powder residue on it, the agent's seizure of it was lawful. See *United States v. Mannino*, 635 F.2d 110, 115 (2d Cir. 1980).

[37] After the initial pass-through of the apartment, and the discovery of the marijuana and scale, the agents were entitled to remain on the premises to secure the apartment from the

destruction of evidence, *United States v. Manley*, 632 F.2d at 987, and to request the assistance of Terry's wife in locating him. The plain view seizure of the business card, which occurred during this period, was thus lawful. Accordingly Terry's conviction is affirmed.

H. Insufficiency of the Evidence Against Haynes

Haynes claims that since there was insufficient proof of his participation in the alleged conspiracy the trial court erred in admitting against him Williams' out-of-court hearsay statements and that the non-hearsay evidence against him was insufficient to permit the jury to find him guilty of conspiracy of the substantive charges against him. We agree.[21]

[38] Before a jury may consider against a defendant a conspiracy count that rests in part on hearsay statements of an alleged co-conspirator, the trial judge must be satisfied by a fair preponderance of the independent non-hearsay evidence that the defendant was in fact a member of the conspiracy. *United States v. Cicale*, 691 F.2d 95, 103 (2d Cir. 1982); *United States v. Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028, 90 S.Ct. 1276, 25 L.Ed.2d 539 (1970). Without the requirement of independent non-hearsay corroboration, co-conspirator hearsay "would lift itself by its own bootstraps to the level of competent evidence," *Glasser v. United States*, 315 U.S. 60, 74-75, 62 S.Ct. 457, 467, 86 L.Ed. 680 (1942), and thus assume the conclusion to be proven, in this case Haynes' membership in the conspiracy.

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[21] Since we find this issue dispositive it is unnecessary for us to consider Haynes' other claims, e.g., that he was denied a fair trial by reason of the prosecutor's improper comments, or to remand for correction of his sentence which the government concedes to be improper by reason of the unauthorized imposition of a lifetime parole. *Bifulco v. United States*, 447 U.S. 381, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980).

[39, 40] The standard for independent proof of participation in the conspiracy is not as high as that needed to submit a charge of conspiracy to the jury, *United v. Alvarez-Porras*, 643 F.2d 54, 57 (2d Cir.), *cert. denied*, 454 U.S. 839, 102 S.Ct. 146, 70 L.Ed.2d 121 (1981). The proof may be "totally circumstantial," *United States v. Ragland*, 375 F.2d 471, 477 (2d Cir. 1967), *cert. denied*, 390 U.S. 925, 88 S.Ct. 860, 19 L.Ed.2d 987 (1968), and the court must view the evidence as a whole rather than consider individual items in isolation, *United States v. Di Palermo*, 606 F.2d 17, 22 (2d Cir. 1979), *cert. denied*, 445 U.S. 915, 100 S.Ct. 1274, 63 L.Ed.2d 599 (1980). Once a conspiracy has been proved to exist, the evidence needed "to link another defendant with it need not be overwhelming." *United States v. Provenzano*, 615 F.2d 37, 45 (2d Cir.), *cert. denied*, 446 U.S. 953, 100 S.Ct. 2921, 64 L.Ed.2d 810 (1980) (quoting *United States v. Head*, 546 F.2d 6, 9-10 (2d Cir. 1976), *cert. denied*, 430 U.S. 931, 97 S.Ct. 1551, 51 L.Ed.2d 775 (1977)).

[41, 42] Notwithstanding this lower standard the government must nonetheless show a "likelihood of an *illicit* association between the declarant and the defendant." *United States v. Ragland*, *supra*, 375 F.2d at 477 (emphasis added). Mere familiarity with a drug dealer does not make one a member of his conspiracy; nor does association with a conspirator provide a sufficient basis for the admissibility of hearsay statements of an alleged co-conspirator. *United States v. Steinberg*, 525 F.2d 1126, 1134 (2d Cir. 1975), *cert. denied*, 425 U.S. 971, 96 S.Ct. 2167, 48 L.Ed.2d 794 (1976); *United States v. Fantuzzi*, 463 F.2d 683, 690 (2d Cir. 1972); *United States v. Ragland*, *supra*, 375 F.2d at 477.

[43] In the present case the independent non-hearsay proof consisted of (1) Haynes' admission that he was known as "Legs" and knew Williams and Harrison, (2) proof of a telephone conversation with Williams on April 9, 1981, and

(3) proof that on April 25, 1981, Williams dialed a telephone number at Haynes' apartment house.[22] The government argues that the short April 9th conversation, in which the portion relied on by it was Haynes' question "what's happening Felix" and Williams' reply "ain't nothing happening Legs," was sufficient to meet the foregoing standards because one can infer that it was narcotics-related when considered with evidence that Williams was at that time out of drugs. We disagree.

Viewed in a light most favorable to the government and "not in isolation but in conjunction," *United States v. Geaney*, *supra*, 417 F.2d at 1121, the independent non-hearsay evidence proves only an acquaintanceship, not the likelihood of an illicit relationship between Williams and Haynes. The expression "what's happening?" is a widespread innocent salutation, the equivalent to "what's cooking?," "what's new with you?," or simply "hello, how are you doing?" Hearsay proof that co-conspirators may on two or three occasions have used the same phrase in the course of conversations with Williams involving narcotics hardly supports the sinister inference demanded by the government, in view of common knowledge that the salutation is widely used by innocent acquaintances. While "[j]udges are not required to exhibit a naivete from which ordinary citizens are free," *United States v. Stanchich*,

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[22] Scraps of paper retrieved from Williams' trash and Williams' notebook containing references to "Legs" are hearsay and accordingly may not be used to meet the *Geaney* threshold. The government understandably did not seek to admit these writings as business record exceptions to the hearsay rule, Fed.R.Evid. 803(6), absent proof of their reliability and accuracy as business records, either through a custodian or other qualified witness subject to cross-examination. *See United States v. McGrath*, 613 F.2d 361, 367-68 (2d Cir. 1979), *cert. denied*, 446 U.S. 967, 100 S.Ct. 2946, 64 L.Ed.2d 827 (1980); *United States v. Baxter*, 492 F.2d 150, 164 (9th Cir. 1973), *cert. denied*, 416 U.S. 940, 94 S.Ct. 1945, 40 L.Ed.2d 292 (1974).

550 F.2d 1294, 1300 (2d Cir. 1977), neither are we permitted to read evil meaning into words usually having an innocent connotation, absent proof (of which there is none here) that they were part of a secret code.

[44, 45] Statements made by Williams on April 25, 1981, when he dialed a number at Haynes' apartment house, were hearsay as to Haynes since only Williams' voice was recorded and there is no non-hearsay proof that Haynes was the person on the other end of the line. However, even if, as the government argues, the Williams' end of the conversation was admissible not to prove the truth of what he said but merely for the purpose of showing that the statement was made, Williams' statements that "you can send Bobby" and "[i]f Gabe come, tell him something about shirts that he had passed," are too ambiguous to cross the threshold required to establish participation in a criminal conspiracy, *United States v. Cianchetti*, 315 F.2d 584, 587-88 (2d Cir. 1963). When evidence used to satisfy *Geaney* is "as consistent with innocence as with guilt," additional evidence linking the defendant to the conspiracy assumes "pivotal importance." *Alvarez-Porras, supra*, 643 F.2d at 57-58. Here, that all-important other evidence is totally lacking. The most that was developed by the evidence was an acquaintanceship between Haynes and Williams plus a *possible* inquiry by the former of the latter about narcotics. As against this meagre evidence the record shows that in the course of eight months of surveillance by trained agents, Haynes was never seen at Williams' apartment. His voice was heard on only one of some 200 taped conversations between Williams and his co-conspirators that were admitted into evidence.

[46] For these reasons the jury should not have been permitted to consider the statements of co-conspirators concerning Haynes and the charges against him should have been dismissed for insufficiency of proof. Accordingly, we reverse

his conviction and remand with directions to enter a judgment of acquittal of the charges against him.[23]

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We have considered the remaining claims made by various appellants and find them to be without merit.

The judgment convicting appellant Haynes is reversed. The judgments convicting all other appellants are affirmed.

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[23] Haynes' conviction under 21 U.S.C. § 843(b) for using a telephone to further the conspiracy must be reversed in light of our ruling that the evidence is insufficient to convict Haynes of the predicate felony of membership in the conspiracy.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the second day of May, one thousand nine hundred and eighty-three.

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UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
WILLIE TERRY,
Defendant-Appellant.
----------X

Nos. 82-1125, 1175, 1177
82-1179, 1181, 1183
82-1185, 1187, 1189

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ERIC NALVIN, ROBERT GUIPPONE, WILLARD WILLIAMS, ONZELO MARKUM, CLARENCE HAYNES, SAINT JULIAN HARRISON, PAUL JENKINS, and ANTHONY MICHAEL PORCELLI,
Defendants-Appellants.
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A petitiion for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendants-appellants, Robert Guippone and Anthony Michael Porcelli,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further ordered that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk
by /s/ _____
Francis X. Gindhart,
Chief Deputy Clerk

Supreme Court of the United States

No. A-1018

ROBERT ANGELO GUIPPONE and
ANTHONY MICHAEL PORCELLI,
Petitioners,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 31, 1983.

/s/ _____
Thurgood Marshall
Associate Justice of the
Supreme Court of the
United States

Dated this 22nd
day of June, 1983

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